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Listening to silence

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Listening to Silence

'Targeted Killing' and the Politics of Silence in
 Customary International Law

PhD thesis

to obtain the degree of PhD at the
 University of Groningen
 on the authority of the
 Rector Magnificus Prof. E. Sterken
 and in accordance with
 the decision by the College of Deans.

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In memory of Gertrud Tanzer

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John Cage 'Lecture on Nothing'

"I am here , and there is nothing to say .

If among you are
those who wish to get somewhere , let them leave at
any moment . What we require is
silence ; but what silence requires
is that I go on talking .

Give any one thought
a push : it falls down easily
; but the pusher and the pushed produce that enter-
tainment called a discussion .

Shall we have one later ?

Or , we could simply de-cide not to have a dis-
cussion . What ever you like. But
now there are silences and the
words make help make the
silences .

I have nothing to say
and I'm saying it and that is
poetry as I need it .

This space of time is organized
. We need not fear these silences
we may love them .”¹

¹ printed in Cage (1959) *Silence*, p. 109

Introduction

Call My Name and I Disappear

In a recent paper on ‘the contemporary practice of self-defence’, the authors Plaw and Reis draw on silence in order to argue that ‘targeted killing’ practices are becoming more permissible. The authors invoke the “muted reaction [...] in regard to the U.S. drone campaign” (Plaw and Reis 2016, 243) and link this silence to non-objections in other post-2001 cases (Plaw and Reis 2016, 240). It leads them to the conclusion that “most other states seem to be willing to acquiesce in this reinterpretation of the customary law of self-defense” (Plaw and Reis 2016, 246). Silence has been invoked by numerous legal experts in recent discussions on a wider interpretation of the right to self-defence (see for example Starski 2017; Reinold 2011; Anderson 2009). Indeed, the majority of all customary international laws are based on silence interpreted as acquiescence (Villiger 1985, 7:17; Byers 1999, 142; Mendelson 1996). As the draft conclusions of the International Law Commission put it: “Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*)” (UN Doc A/CN.4/L.872 2016, 3).

Yet, silence is not only a question of who can speak, but a question of what is listened to – and how this listening takes place. Silence depends on the “horizon of expectations” (De Behar 1995, 122:7) of the interpreters, the implicit assumptions of where and when speech expectations are disappointed and what function silence is seen to assume. This dissertation uses silence as an analytical lens in order to examine the processes of customary international law formation. The point of my analysis is not to find out whether there is silence in the case of ‘targeted killing’ or what this silence might have been intended to mean, but to examine what silence can tell us about legal knowledge production. Tracing the fine line between silence as a communicative act and different forms of *silencing*, the dissertation not only advances a new angle on current debates on the un/lawfulness ‘targeted killing’ but proposes a new theorisation of customary international law.

In traditional approaches to customary international law, silence tends to be cited as “first, a fact and a verbal omission” (Starski 2017, 22). Silence as acquiescence is so self-evident, that it is often just invoked in half-sentences (see for example Tams 2009, 378; Reinold 2011, 257). Based on the understanding that customary international law is a set of rules detected from the observation of state acts, the main question revolves around whether a given silence is “legally qualified silence” (Villiger 1985, 7:39) and can be counted as acquiescence. This logic has been critiqued by scholars who argue that it neglects to take into account that weaker states might not be able to speak – or that their speech might not be given weight by international law experts (see for example Kelly 1999; B. S. Chimni 2018; Bradley and Gulati 2010). In a recent article, Chimni thus argues that processes of customary international law formation “marginalize third world voices” (B. S.

Chimni 2018, 20). He calls for a new ‘postmodern doctrine of customary international law’ which does not derive rules “from the fact of coordination between states” but instead allows “greater weight to the practice of non-state actors” (B. S. Chimni 2018, 38).

Following these lines of critique, the present dissertation argues that the discursive practices of non-state actors (scholars, NGOs, journalists, etc.) already have weight in customary international law formation. It is through these discourses that taken-for-granted assumptions are reproduced and discursive facts (such as silence) are created. These discursive practices do not necessarily reflect a more democratic process, however. The dissertation hence argues that it is necessary to develop a different understanding of customary international law which traces the role of these implicit assumptions. I propose to theorise customary international law as a type of language game in which those who are normally understood to observe state acts as if from the outside, directly participate. Building on Wittgenstein’s philosophy of language and on discursive approaches to the international (Werner and De Wilde 2001; Doty 1993a; Pin-Fat 2000; Aalberts 2012; Mattern 2005), I thus use silence as an analytical lens in order to show the role of implicit assumptions within customary international law. Examining what silence can do in customary international law then reveals layers of contestation in the case of ‘targeted killing’ which would otherwise be hidden from view.

Silence offers itself as an analytical lens, not just because it is so fundamental for customary international law, but because its very existence depends on what is not listened to. The claim that there was a “muted reaction [...] in regard to the U.S. drone campaign” (Plaw and Reis 2016, 243) can thus only be invoked by excluding voices, such as

the 2014 Human Rights Council resolution on armed drones (UN Doc A/HRC/RES/25/22 2014). The common-sense invocation of silence as “a fact” (Starski 2017, 22) is problematic because it does not explicate the many assumptions which the invocation of silence implicitly relies on. Building on sociolinguistic studies shows that silence can only be communicative if there is the perception of a *prompt* (an act, provocation, question), a disappointed *expectation* of speech, an assumption of *relevance* and perceived *deliberateness* of silence (Schröter 2013; Huckin 2002). Most traditional approaches to silence as acquiescence focus entirely on the prompt, the length and regularity of a state practice and whether it was known to the silent states (see for example UN Doc A/CN.4/682 2015). What is neglected, however, are the assumptions of relevance and expectations of speech by the interpreters themselves, without which silence would not be noted at all. My dissertation uses the invocations of silence in recent counterterrorism debates in order to examine these underlying assumptions – and what they can tell us about the language game of customary international law.

In the case of ‘targeted killing, for example, silence can only work as tacit consent by presupposing ‘targeted killing’ as a new and legally relevant prompt. ‘Targeted killing’ thus has to be understood as a challenge to existing international law provisions which raises an expectation of speech. Through these assumptions, silence is noted as non-objection. Yet, this understanding of ‘targeted killing’ is not as self-evident as it first appears. Examining how ‘targeted killing’ can function as a new prompt, Chapter IV analyses the historical continuities of ‘targeted’ counterterrorism practices and claims which have been justified in similar ways throughout previous decades. I argue that the

delineation of ‘targeted killing’ as something new and legally relevant depends already on how it is invoked as such – by scholars, journalists, NGOs, etc.. My research indicates that states have avoided using the term ‘targeted killing’ altogether, instead relying on more traditional terms such as ‘assassination’ or ‘extrajudicial execution’ when discussing ‘targeted killing’ practices.

Through the lens of silence, the dissertation thus examines how discursive facts gain meaning within the language game of customary international law. While traditional approaches to international law often understand acquiescence through the objective application of criteria, which determine whether a given silence is "legally qualified" (Villiger 1985, 7:39; see also UN Doc A/CN.4/682 2015), this fails to reflect on how it is only through maintaining a high expectation of speech (sometimes despite steep power asymmetries) and through assuming legal relevance, that silence can be invoked as potential acquiescence in the first place.

Silence can work in different ways within the language game of customary international law. If legal relevance is not assumed, silence can thus function to ignore a practice or claim for it not to gain significance (D’Amato 1971, 101). Chapter V shows, for example, that a considerable number of state representatives have framed silence on armed drone attacks as confirmation of the status quo, stressing that there is no necessity to respond to the prompt of armed drone attacks and that “the existing legal framework was sufficient and did not need to be adapted to the use of drones” (UN Doc A/HRC/28/38; para 56). These lines of contestation cannot be made sense of if silence is approached as potential acquiescence – precisely because the invocation

of silence as potential acquiescence necessarily remains within a modality in which legal relevance is already presupposed.

Unpacking and problematizing the taken-for-granted assumptions through which silence gains discursive functions within the language game of customary international law, the dissertation provides a framework for a more layered understanding of customary international law. Silence can work as tacit consent, as a form of ignoring; but it can also function as a diplomatic move, to avoid ‘linguistic entrapment’ (Mattern 2005, 97; Johnstone 2003, 468) and keep the question of legality open. As some studies on diplomacy have pointed out, silence is thus particularly important in complex discourses and situations of steep power asymmetries, in which actors are careful when and how to speak (see for example Burhanudeen 2006; Johnstone 2003). The Pakistani representative, who introduced the resolution on armed drones at the UN Human Rights Council was, for example, cautious and argued that “the resolution did not refer to any specific country, and did not intend to name or shame anyone.” (UN HRC News and Events 2014). If a high speech expectation is maintained at a forum such as the Security Council, in the form of direct confrontation of US practices and claims, more indirect lines of contestation are hidden from view.

The dissertation thus seeks to advance a more layered notion of customary international law. Rather than understanding customary international law as a set of rules derived from observing state interaction, I show how fundamentally diverging modalities are at work at the same time. Those who are normally understood to observe state interaction from the outside (e.g. scholars) are directly participating in re-producing or eradicating particular modalities. Problematizing the

processes of meaning-making through which communicative moves *gain* a particular function, I use silence in order to reflect on the banal and taken-for-granted presuppositions determining how the language game of customary international law is set up. By banal I mean those assumptions, which are not based on legal principles or reflect strategic, political positions but stem from more dispersed discursive practices which have, for example, construed ‘targeted killing’ as a concept within anglophone scholarship and media discourses – even though most state representatives have avoided using the term.

The empirical material I examine for this investigation encompasses an analysis of over 900 Security Council debates from the years 2000 – 2016, which I examined for the key words ‘targeted’, ‘assassination’, ‘execution’, ‘extrajudicial’, ‘drone’, ‘unmanned’, and ‘remote’. I furthermore investigated Human Rights Council resolutions and panel discussions on armed drone attacks and examined the United Nations Yearbooks from 1950 to 2016 regarding the key words ‘targeted’, ‘assassination’ and ‘drone’. The point of this analysis is not to determine whether there is silence on ‘targeted killing’ but rather to be able to show that invocations of silence are always based on particular expectations of speech, at particular fora, in particular time frames – and to challenge the idea of an underlying essence of silence. The dissertation thus examines what Schröter calls the “metadiscourse about silence” (2013, 48), documents which invoke silence, such as court cases and international law scholarship. I engage with these metadiscourses on silence in order to examine not only the assumptions underlying silence claims, but the epistemological problems which the invocation of silence raises. Within the complicated network where government acts and statements are reported on (e.g. websites, domestic media outlets,

international media coverage, search engines, archives, scholarly literature), invoking silence often relies on implicit methodological choices, which tend to exclude non-Western sources and actors (see for a similar point Kelly 1999; B. S. Chimni 2018).

Not trying to represent those who are excluded from international law discourses, the dissertation advances a more immanent critique of international law which follows Spivak's suggestion of engaging with the *listening* skills of Western knowledge production (Spivak 1988). Silence as an analytics offers an opportunity to rethink customary international law in a way which reflects the power relations not only in inter-state relations, but in knowledge production more generally. Rather than critiquing or dismissing customary international law as a whole, the dissertation shows different modalities of engaging in customary international law understood as a language game. The lens of silence thus reveals forms of contestation already at work – though often overlooked – and shows the assumptions through which the discussion on issues such as 'targeted killing' is set up.

As *Chapter I* discusses, most approaches to 'targeted killing' have either assumed a fixed meaning of the concept or have tried to arrive at a definition of 'targeted killing' by focusing on the loud voices, the justifications by powerful actors (such as the US and Israeli government) and cultural representations of 'targeted killing' within Western societies. This is problematic because it lends further volume to those voices. It risks reaffirming the more contentious claims advanced with the concept and reproduces 'targeted killing' as a category. Silence as an analytical lens not only shifts focus to those actors who cannot speak (or have not been heard) in these debates, but also develops an understanding of customary international law which

engages with the processes of meaning-making. It thus allows to investigate the power relations which contribute to different forms of speaking – not just in inter-state relations but in legal knowledge production more generally.

In order to use silence as an analytical lens it is necessary to go beyond existing literature on silence in the international realm, which is often based on the idea that silence is an absence of language and outside of discourse. Most traditional scholarship in international law hence grasps silence as an absence of protest and already approaches silence as potential acquiescence. This not only overlooks the political context which limits the possibility of speech, but also fails to reflect on the assumptions through which silence can *become* communicative. More critical scholarship, on the other hand, tends to treat silence as exclusion from speaking, as the passive position of marginalised actors. This neglects to grasp the productive functions of silence which can be mobilised by powerful, as well as by less powerful actors.

This dissertation provides a new conceptualisation of silence in order to understand silence as a communicative move which can gain different functions, while always being embedded in the silencing dynamics of a language game. *Chapter II* develops a theoretical framework in order to use silence as an analytical lens. Distinguishing between silence as absence (which has no signalling function) and communicative silence, I build on Sociolinguistic studies (Schröter 2013; Jaworski 1992a; Kurzon 2007) and develop an analytical framework which includes four contextual parameters for silence to become communicative: (i) the preconception of a prompt – a question, act, or claim which has not been reacted to, (ii) the perceived deliberateness of silence, (iii) the assumption of relevance within the

discursive context and (iv) the disappointed expectation of speech by those who notice silence. Depending on these parameters, silence can gain different functions. It might, for example, work to disregard a prompt, to resist a request, to tacitly consent, to postpone a decision, to diplomatically avoid conflict – or it might remain unnoticed altogether.

This analytical framework of silence provides a first step towards conceptualising the different roles of silence in inter-state relations. This is important for fields ranging from diplomacy, foreign policy, international negotiations, as well as critical approaches to international politics, in which the active functions of silence have not been researched. In the context of my dissertation, I use this analytical lens in order to theorise customary international law as a type of language game which has different modalities. Examining the processes of international law formation in the case of recent counterterrorism debates, I demonstrate how the communicative function silence gains (as disregard of a claim, as acquiescence, or as maintaining ambiguity) reveals the assumptions of a particular modality of the language game of customary international law.

Analysing the assumptions which are necessary for silence to work as acquiescence, *Chapter III* examines reactions in the case of recent ‘targeted killing’ debates. In what I call the modality of evidence silence appears as potential tacit consent to a preconceived prompt. I argue that this understanding of silence necessitates a high expectation of speech and a presumption of deliberateness which – in the case of ‘targeted killing’ – ignores the asymmetrical political context within which silence is situated. Building on my empirical investigation of government statements and silences around ‘targeted killing’ and armed drone attacks at the UN, I examine how silences are always situated within a

particular context which determines who can speak, where, how and about what. Unpacking how the acquiescence doctrine frames silence as tacit consent without reflecting on the question of exclusion and the role of interpretation as part of this exclusion, thus shows how the “brutality of the passage of fact into law” (Stern 2000, 93) is masked.

Silence can also work to ignore an issue for it not to gain legal relevance. If there is no preconception of a legally relevant prompt, even doctrinal international law might thus use and interpret silence as confirmation of the status quo. Silence can also work to leave questions about legality open, for example as a diplomatic move or to post-pone a decision. Chapter III provides a synchronic analysis of how different speech expectations or assumptions of relevance change not only the interpretation of silence but whether it gains any discursive existence. Challenging the assumption that “silence is first, a fact and a verbal omission” (Starski 2017, 22), Chapter III reveals the importance of interpretation and shows how discursive facts (such as silence) are not observed from the outside but gain a role only through particular assumptions within the language game of customary international law. The question is then not just whether a given silence can or cannot be interpreted as acquiescence, but how silence can come to gain a role in the first place.

Chapter IV consequently builds on the question of how it has been possible for silence to become communicative in a diachronic analysis of the history of legal debates of ‘targeted killing’ claims and practices. I problematize the processes through which ‘targeted killing’ has been able to function as a prompt. Particularly in customary international law, state silence can only work as acquiescence if it is perceived to be a reaction to a new state practice or legal claim which “calls for a response”

(International Court of Justice 2008, 121). Problematizing the assumption that there is something called ‘targeted killing’ out there, the analytical focus on silence examines how ‘targeted killing’ can *function* as a prompt for non-reaction (see similarly Aalberts 2012; Werner and De Wilde 2001). In order for silence to be noted as potential evidence at all, ‘targeted killing’ thus needs to be more than just something that happened. It needs to be seen as something that happened which is considered legally relevant and has raised an expectation of speech.

Tracing the continuities of the concept, I argue that ‘targeted killing’ claims and practices have strong historical parallels with the practices and claims of colonial ‘police bombing’ as well as with ‘assassination in self-defence’ which the US and Israeli government had practiced and justified throughout the 1980s and 1990s. What is new, I argue, is the way current counterterrorism discourses have used the term by linking the concept to the representation of the new technology of Unmanned Aerial Vehicles (UAV) or armed drones. This is important because it distances the concept from its more traditional terminological siblings, such as ‘assassination’. The novelty supposition, I argue, lends the concept a legal relevance it would not otherwise have and raises an expectation for governments to speak.

The point of this historical analysis is not to say that ‘targeted killing’ is nothing new at all, that it is not legally relevant and should not be raising an expectation of speech; rather the point is to show that this delineation of ‘targeted killing’ is only *one* way of engaging with practices, such as armed drone attacks, in the language game of customary international law – which rests on many implicit assumptions. Chapter V then shows how alternative modalities are not only possible but are already at work in current discussions of the evolving un/lawfulness of

‘targeted killing’. Focusing on the banal supposition of novelty, Chapter V reveals more quiet and indirect contestations taking place at the inter-state level, such as the systematic avoidance of the term ‘targeted killing’ by most governments in the over 900 Security Council debates I analysed.

Chapter V thus provides a more decentralized reading of customary international law formation; decentralised in two ways: in that struggles of many governments at the inter-state level often take place not at the most central fora (such as the Security Council) and not through dominant terms within a particular modality; instead they often seem to precisely be *about* the modality; furthermore they often take place in more indirect forms of contestation, such as the insistence (despite protest from the US government) to discuss armed drone attacks at the Human Rights Council. Second, decentralised in that interpretive struggles within the language game of customary international law are shaped by banal assumptions, such as the novelty supposition of ‘targeted killing’, which are rarely explicitly discussed but are reproduced as self-evident in dispersed discursive practices, such as scholarship, policy documents and media coverage.

This highlights the necessity to reconceptualise international law formation as a language game with more diverse players and more diverse forms of participation than a state-centric analytical gaze would tend to allow for. Focusing on how customary international law is at work *differently*, my research uses the diverse manifestations of silence (from absence, to disregard, to consent, to ambiguity) in order to show the importance of taken-for-granted assumptions for the role and the very existence of discursive facts (such as silence). Not to reflect on these assumptions risks reproducing a self-evident, often Eurocentric

worldview which amplifies the voices of a minority of actors (such as the US government). Silence as an analytical lens instead shifts focus to who cannot speak and what is not heard and provides an analytical framework to grasp more quiet and indirect struggles taking place in the language game of customary international law.

“I am here , and there is nothing to say .

If among you are
those who wish to get somewhere , let them leave at
any moment . “²

² John Cage ‘Lecture on Nothing’, printed in Cage (1959) *Silence*, p. 109

Chapter I

Listening to What Has (Not) Been Said

In April 2015, the European think tank ‘International Centre for Counterterrorism’ (ICCT) published a paper titled ‘Towards a European Position on Armed Drones and Targeted Killing’ (ICCT 2016). The document is only one of many contributions which show the immense interest the concept ‘targeted killing’ has received by scholars, legal experts and policy makers (see for example UN Doc A/HRC/14/24/Add.6 2010b; European Parliament 2014; Joint Committee on Human Rights 2016b; Melzer 2008; Radsan and Murphy 2012). In the ICCT paper, the authors draw particular attention to the question of the “public silence on the issue of drone use” (ICCT 2016) and whether this silence could be read as acquiescence to a changing customary interpretation of the right to self-defence. Because ‘targeted killing’ debates link into a heated discussion on whether the customary interpretation of the right to self-defence has changed, silence has been invoked as a question of potential acquiescence.

This Chapter examines the concept ‘targeted killing’ and recent debates around a changing customary interpretation of the right to self-defence, in order to demonstrate how silence as an analytical lens provides a new approach to existing discussions. The first part examines the contestations which the concept ‘targeted killing’ has raised in customary international law debates in how it has been seen to challenge existing interpretations of the right to self-defence. I argue that despite the multi-faceted debate, most literature on ‘targeted killing’ has assumed a fixed meaning of the concept and often focuses on the practices and justifications of a few powerful actors (such as the US and Israeli government). This is problematic because it risks amplifying those voices and claims. Silence shifts analytical focus from the loud voices towards those actors who have been claimed to be silent and opens space to investigate the processes of meaning-making.

The second part of the Chapter explains how silence can thus be used to examine the power relations of customary international law formation – not just in the sense of power politics in the inter-state system, but in the sense of dispersed discursive power relations in legal knowledge production. Silence invoked as acquiescence raises problems from the perspective of critical and Third World Approaches to International law because of the forms of exclusion the acquiescence doctrine rests on – forms of exclusion in which legal discourses themselves participate. This shows the need for a theorisation of customary international law in which forms of exclusion and silencing are analysed as part of the process. Silence as an analytical lens reveals not only the silencing dynamics within the process of how facts are turned into law, but within the processes of how facts (such as silence)

become facts in the first place and can gain different discursive functions.

The third part of this Chapter draws on existing literature on silence in international law and international politics. I argue that silence in these studies is often presupposed on the idea of the absence, of being outside of discourse in a binary conceptualisation of speech and absence of speech. Most international law literature thus preconfigures silence as a given fact, an absence of protest, overlooking both the political context which limits the possibility of speech and the assumptions of the interpreters through which silence gains communicative existence. More critical approaches to international law and international relations have showed how silence can be a form of exclusion from partaking in international politics, the marginalised position of silenced voices. This, on the other hand, neglects to analyse the productive functions silence can assume in the international realm. Showing the limitations of current approaches to silence in international law and international relations, as well as the benefits of using silence as an analytical lens, the Chapter demonstrates why it is important to develop a new conceptualisation of silence in Chapter II.

1.1. Approaching ‘Targeted Killing’ Debates

The use of armed drones by the US government to conduct lethal attacks inside and outside of zones of armed conflict in so-called ‘targeted killing’ strikes has received considerable scholarly and media attention. From its inception the use of the term ‘targeted killing’ has been closely linked to the new practice and technology of armed drones.

Not only has the term developed concomitantly with armed drone attacks, they have also been discursively linked together. ‘Targeted killing’ is often discussed hand in hand with the technology of drones, as in the Parliamentary Assembly of the Council of Europe report on “Drones and Targeted Killings” (EU Committee Report 2015, 3; see also ICCT 2016; Joint Committee on Human Rights 2016; and UN Doc A/HRC/14/24/Add.6 2010). The technology of armed drones has played such a significant role in legal discourses on counterterrorism use of force that the drone itself has been studied through the agency it constitutes within the field of legal expertise (Leander 2013; Walters 2014).

In customary international law, the practice of armed drone attacks and similar ‘targeted killing’ operations has received attention through the way in which it has been conceptualized as a new practice which might over time change existing customary interpretations of the right to self-defence (Brooks 2014; Plaw and Reis 2016; Radsan and Murphy 2012). Unlike the written “thereness” (Kammerhofer 2004, 524) of treaty law, customary international law changes through a more organic process of regular state practice and acceptance by the majority of governments (Villiger 1985, 7:17; Byers 1999, 142; Mendelson 1996; Kammerhofer 2004). Even a practice which is breaking existing laws may over time become legal, if other states fail to effectively protest against this practice. Silence thus works as acquiescence through its connection with a practice which prompts no protest. The International law Commission has confirmed this in the 2015 report on customary international law, which dedicates a whole section to the question of when “inaction may also serve as evidence of acceptance as law” (UN

Doc A/CN.4/682 2015; see similarly in the draft conclusions UN Doc A/CN.4/L.872 2016).

The question of a potentially developing lawfulness of ‘targeted killing’ has by many been seen as problematic because of the ways in which the deliberate killing of specific individuals or groups of individuals has been justified by the US and Israeli government; justifications which crystallize some of the most contested aspects of the legal claims advanced with the war on terror more generally (Melzer 2008; Birdsall 2018; Wong 2012; O’Connell 2010; Saura 2016). In its most problematic form (as Chapter IV shows, the concept has been used in converse ways), justifications around ‘targeted killing’ have challenged more traditional interpretations of the right to self-defence in their temporal, conceptual and geographical circumscription of military violence (see for a similar discussion of the issues raised by ‘targeted killing’ the report by Special Rapporteur Emmerson in UN Doc A/68/389).

Temporally, ‘targeted killing’ claims have relied on a pre-emptive understanding of the right to self-defence against individuals who are seen to present a threat to carry out *future* terrorist attacks. ‘Targeted killing’ claims have depended on an ambiguous notion of threat which “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future” (Department of Justice 2013, 7). This has been seen as problematic because all suspected terrorist leaders might thus be understood as an imminent threat who can be lawfully targeted (Brooks 2014, 94; Birdsall 2018, 17). The notion of pre-emptive self-defence runs counter to other interpretations of the right to self-defence which require a prior (or imminent) armed attack (Greenwood 2003; Reisman and Armstrong 2006; Bethlehem 2012; Garwood-Gowers 2011; Anghie

2005). Third World Approaches to International law have warned of “all the ways in which pre-emption can disadvantage third-world states, which will be the inevitable object of the exercise of the doctrine” (Anghie 2005, 51).

Conceptually, ‘targeted killing’ has raised debates regarding the applicable legal framework. Investigating ‘targeted killing’ within the International Human Rights Law (IHRL) framework, attacks have been seen to raise problems not only regarding the right to life but also the right to due process (Heller 2013). It has furthermore been debated whether the use of military weapons could comply with law enforcement measures at all and the conclusion often is that “under IHRL, there are very limited circumstances in which it may be justifiable to use lethal force against a terrorist” (Wong 2012, 130; UN Doc A/HRC/14/24/Add.6 2010a). This is important because, as Chapter V demonstrates, governments have tended to discuss armed drone attacks at the Human Rights Council.

Within armed conflicts, attacks would be judged according to the International Humanitarian Law (IHL), for example regarding the requirements for proportionality and the distinction between combatants and non-combatants; yet it has also been questioned whether ‘targeted killing’ can be lawful within armed conflicts since the targeting of specific, named combatants would undermine the assumption that “soldiers are not criminals” (Gross 2006a, 326; UN Doc A/HRC/28/38 2014). More than just prompting confusion about the applicable framework, ‘targeted killing’ has been perceived to conceptually blur the frameworks for the regulation of military force, on the one hand, and the regulation of law enforcement measures outside of armed conflicts, on the other hand (Kessler and Werner

2008a, 305; Blank 2011; Anderson 2009; Joint Committee on Human Rights 2016b).

This is particularly contentious because ‘targeted killing’ attacks have been claimed to lawfully take place “outside areas of active hostilities” (The White House 2013) – while applying principles of the laws of war (Brennan 2012; Paust 2009, 260). This challenges the idea of threshold requirements for a violent confrontation to be regarded as an armed conflict in international law (International law Commission 2010; Wong 2012). According to these requirements, the intensity of fighting thus has to reach a certain threshold on both sides of the conflict and both sides have to show a degree of organisation in order for a violent clash to be regarded as an armed conflict, a situation which has been questioned for at least ‘targeted killing’ practices (Brookman-Byrne 2017; O’Connell 2010, 597; Heller 2013, 110). Attacks outside of zones of armed conflict would be judged according to Human Rights Law and would rarely be lawful.

There is, however, more fundamental disagreement over what constitutes an armed conflict. ‘Targeted killing’ attacks have been closely linked to arguments of a so-called global war on terror between the US and “al-Qaeda, as well as the Taliban and its associated forces” (Harold Koh, Department Of State 2010) according to which any use of force against these individuals has been argued to fall within the framework of the laws of war. It has thus been claimed that “the armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict” within the framework of which “all of the customary laws of war apply” (Paust 2009, 261).

This relates to the geographical problems ‘targeted killing’ claims have been seen to raise. For the flight of an aircraft over territorial airspace, or the use of police or military measures on the territory of another state, there has to be “valid consent” (UN Doc A/RES/56/83 2002 art. 20) of the territorial state unless the measure is taken in lawful self-defence³. Self-defence in another state has been argued to only be justified if an attack by non-state actors was attributed to that other state (Wong 2012, 136). According to this logic, self-defence in another state can only be justified if the government of that state had been responsible for an armed attack, as the ICJ ruled in the *Nicaragua* case (International Court of Justice 1986). Juame Saura put it rather provocatively: “could anyone imagine the United Kingdom bombing the Republic of Ireland during the IRA years (or bombing the US, by the way, where the IRA used also to obtain funding)?” (Saura 2016, 137).

In the context of ‘targeted killing’ attacks and similar counterterrorism measures, some have argued that non-state actors can be directly targeted independent of attribution of the attack to the state or consent of the territorial state in which the individuals are located (Paust 2009), often hinging solely on the requirement that the territorial state is seen to be “unable or unwilling to take actions against the threat” (Brennan 2012) as US legal adviser Brennan has argued. This so-called ‘unable or unwilling’ doctrine has itself become the subject of much debate in international law scholarship (Ahmed 2013; Corten 2016; Couzigou 2017). While some have argued that the doctrine has developed as a new customary interpretation of the right to self-defence which allows

³ The other important exception to the prohibition of the use of force is authorisation by the Security Council

states to use military force on foreign territory “to the extent that the foreign State cannot be relied on to prevent or suppress terrorist activities” (Trapp 2007, 156), others have claimed that this interpretation would open the door for powerful states to invoke the right to self-defence in a discriminatory notion against less powerful states (Ahmed 2013; Corten 2016).

Going beyond the ‘unable or unwilling’ doctrine, some have argued that the ‘targeted killing’ of non-state actors could be entirely divorced from the question of state sovereignty and indeed some US justifications seem to go in this direction. Blurring the line between criminal justice and armed conflict, the use of bombs and hellfire missiles against individuals has been justified as small-scale violence short of war, which is juxtaposed to a military invasion, which in Obama’s words would “lead us to be viewed as occupying armies” (Barack Obama 2013; see also Brennan 2012). These approaches to ‘targeted killing’ are sometimes linked to dubious interpretations of exceptions to the use of force, such as the idea that “modern day terrorists are *hostes humani generis* – common enemies of humankind” (Pickard 2001, 21). The justification of targeting particular individuals wherever they are found, divorced from the problem of infringing state sovereignty, has been critically investigated by a number of scholars in the context of a de-territorialized and individualised understanding of modern warfare which fundamentally challenges the inter-state paradigm of international law and some of its basic conceptions of war and peace (Gunneflo 2016; Chamayou 2015a; Kessler and Werner 2008a; Kennedy 2009).

Such challenges have led scholars to warn of the damaging effects of ‘targeted killing’ practices and the practice of US armed drone attacks

for international law: “U.S. drone strikes thus present not an issue of law-breaking, but of law’s brokenness. Sustained U.S. assaults on the meaning of core legal concepts have left international law on the use of armed force not merely vague or ambiguous but effectively indeterminate” (Brooks 2014, 98). Because of the temporal, conceptual, geographical and doctrinal challenges of the concept, debates about a potentially evolving lawfulness of ‘targeted killing’ thus sit at a particularly sore point in current international law discussions on the use of armed force in self-defence. These discussions have often been portrayed as a debate between ‘restrictive’ and ‘expansionist’ scholars who argue for a narrow and more expansive reading of the right to self-defence respectively (Kammerhofer 2016; De Hoogh 2016; Corten 2005).

Setting up the debate as a confrontation between restrictive and expansionist camps, is not unproblematic, however, because it pushes critical and Third World Approaches to the side-lines, as Anne-Charlotte Martineau pointed out (Martineau 2016; Lorca 2012). It thus hinders a more nuanced investigation of the debates. Critical scholarship on ‘targeted killing’ attacks might for example assume a restrictive reading of the right to self-defence but will often go beyond a formalistic interpretation of international law and not understand international institutions as the innocent bulwark against unilateralism of powerful states (Alvarez 2008; Bhupinder S. Chimni 2004; Okafor 2005; Koskeniemi 2007; Kennedy 2009). Analysing the political and cultural conditions which have contributed to make ‘targeted killing’ not only possible but part of the legal grammar (Gunnflo 2016; Grayson 2016; D. Gregory 2011b), claims around ‘targeted killing’ can be seen to symbolise the ways in which international law can also constitute an

“apologetic” (Koskenniemi 2005; see also Werner 2010, 67) rendering of international law, or even an imperial legitimisation of violence (Okafor 2005; Anghie 2005; Bhupinder S. Chimni 2004).

Rather than directly investigating ‘targeted killing’ practices and justifications in and of themselves, whether they are seen as an expression of global imperialism which instrumentalises international law, or as US unilateralism which is un/successfully opposed by legal principles, what I am concerned with is the claim of acquiescence which has been argued to sustain ‘targeted killing’ in interpretive struggles for the lawfulness and legitimacy of the practices and claims it has described. I thus focus on the *re*-action to ‘targeted killing’ claims and practices and on the assumptions necessary for silences to be mobilised in particular ways. This shifts away from understanding (or trying to understand) ‘targeted killing’ as a category with fixed meaning and instead directs attention to the processes of meaning-making in more decentralised discursive practices. Silence as a lens thus raises the question how ‘targeted killing’ can *function* as a prompt which calls for a reaction, a point Chapter IV unpacks in more detail. It also shifts focus away from the representations of ‘targeted killing’ by powerful actors towards the ways in which other actors have reacted, circumvented, disregarded and ignored them.

Most of the above cited scholarship on ‘targeted killing’ focuses on the military practices of some states (mostly the US and Israel) and how attacks have been represented legally, politically and culturally within dominant outlets. Yet, concentrating on the loud voices and contentious claims of a minority of powerful actors risks to thus reinforce these claims (Charlesworth 2002; Corten 2005). As Gray puts it: “the natural focus of writers on controversial cases (...) gives an

unbalanced picture and distorts our perception of state practice; it helps to give the impression that the far-reaching claims of states like the USA and Israel are normal rather than exceptional” (Gray 2008, 117). There seems to be a particularly strong emphasis on the practice of those who are regarded powerful actors within expansionist interpretations of the right to self-defence, who often base their argument of a changing customary international law on a hand-full of cases (a point Chapter III discusses in more detail).

Shifting away from the controversial action of the minority of governments towards re-actions and contestations, is in tune with more restrictive ways of approaching a potential change of customary international law, which emphasises the importance of *opinio juris*, the conviction among states that a legal conviction underlies both the state practice itself and the reaction by other states (Corten 2005, 816; Gray 2008). According to this more voluntarist view, customary international law needs to reflect the actual legal conviction through explicit or implicit consent of states. This is also similar to a more inter-actional reading of international law (Brunnée and Toope 2010), which argues that law’s source of obligation is the legitimacy it gains, not from the ‘factual’ practice of some powerful states, but from the interactional character of its constitution (Brunnée and Toope 2010, 52).

Yet, the point of my focus on silence is not primarily to critique the emphasis of ‘expansionist’ scholars on the practice of a minority of governments (Gray 2008, 21; Corten 2005, 817). My main point rather is, that all invocations of silence move within a worldview within which practices and reactions are already framed along particular lines, a framing in which scholarship itself participates. Zooming into the role of silence itself, rather than the question of *opinio juris*, my project is thus

particularly concerned with the “horizons of expectation” (De Behar 1995, 122:7) revealed by silence gaining different functions. Rather than focusing solely on state actions (and inactions) where interpreters are understood to observe state practice from a bird eye perspective, this focus on silence opens up space to examine legal knowledge production in a more decentralised way.

1.2. A Hearing Test for International law

The last section suggested that silence can serve as a lens in order to examine current debates on ‘targeted killing’ and the right to self-defence. This section explains how I use silence to examine customary international law more generally. I argue that the lens of silence contributes a new way of theorising customary international law as a language game in which the function of a discursive move (such as silence), fundamentally relies on implicit and taken-for-granted assumptions, which are re-produced by everyone writing on the un/lawfulness of an issue. After a brief overview of the significance of the acquiescence doctrine for doctrinal understandings of international law, I show the problems which a positivist understanding of international law – as illustrated through the conceptualization of silence as acquiescence – raises from the perspective of more critical and Third World Approaches to International law. I argue that it relies on the analytical separation between a political realm of state interaction and a legal realm of observation and codification. Silence shows how this analytical separation not only neglects to take power asymmetries and colonial legacies at the inter-state level into account, which underlie principles such as the acquiescence doctrine, but also neglects to reflect

on the participation in these silencing dynamics by legal experts themselves.

The acquiescence doctrine is crucial in international law, from jurisprudence, to treaty interpretation, to customary international law formation (Chan 2004; Starski 2017, 24; Kopela 2010). Most customary international laws thus come about through a small number of active states and the acquiescence of the majority of states (Mendelson 1996, 177). In international law writings, the acquiescence doctrine is often understood as a way of balancing the need for international law to reflect the factual state of government interactions on the one hand, and the legitimacy it derives from consent by the majority of states on the other hand (see Corten 2005; Wolfke 1993; Mendelson 1996; Villiger 1985; Petersen 2007). For strands which put more emphasis on the desirability and effectiveness of international law⁴, acquiescence is a way to adapt international law to the political ‘reality’ and its needs, where “trends must then be tested against the requirements of world public order as a means of assessing their adequacy” (Reisman 1999; Guzman 2011). For more voluntarist strands, acquiescence is important in order to confirm that what exists as law originates with the consent of states as the law-generating actors (D’Amato 1971; Mendelson 1996; Gray 2008). Both strands have in common that they tend to approach silence in a positivist way as a given state act, “a fact and a verbal omission” (Starski 2017, 22).

This approach to customary international law, I argue, relies on a two-level imaginary; there is the ‘political level’ where state representatives

⁴ Koskenniemi identifies this strand as a policy-oriented approach; see (Koskenniemi 2011, 42)

and some other important players (such as the Security Council) make decisions, act, pronounce statements or remain silent. This is observed from the 'legal level' where scholars, courts and other experts watch, interpret, codify and judge acts which are legally relevant. When experts try to determine the current state of customary international law, the field of political action is hence scrutinised in order to filter out legally relevant acts or statements – as well as legally relevant silences (See for example Trapp 2007; Starski 2017; Reinold 2011). From the perspective of critical and Third World Approaches to International law (TWAAIL), this conceptualisation of customary international law is problematic for at least two reasons.

First, it neglects to analyse the colonial legacy of legal principles and the power asymmetries inherent in their current application. Critical and TWAAIL perspectives have advanced important postcolonial readings of international law which scrutinize the historical legacy of legal principles (Mutua 2000; Anghie 1999, 2005; Okafor 2005). The acquiescence doctrine then appears through its legacy as a tool for powerful states to impose standards onto Third World peoples (Bradley and Gulati 2010, 230; Stern 2001; B. S. Chimni 2018). Customary international law is based on the presumption of consent – “a presumption founded on the silence of the minority state which has not protested and on the silence of the new state at the moment of its accession to independence” (Stern 2000, 98). By referring to abstract and seemingly objective, legal principles, this reproduction of power asymmetries within and through international law is masked.

Second, it construes a distance between the realm of objective legal assessment and political state acts which, as critical scholars have argued, cannot ultimately escape the political nature of the act of

interpretation itself (Koskenniemi 2007; Kennedy 2009, 116; Douzinas 2006; Anghie 1999; D'Aspremont 2012; Kratochwil 2000). Because international law experts are crucial for determining whether customary international law has formed, their understanding greatly influences the content and interpretation of legal rules (Kelly 1999, 470; Koskenniemi 1990). The attempt of technical application of objective legal principles then keeps underlying political conceptions about the world implicit: "Acquiescence or presumed acceptance theories are an exercise in formalism that provide a doctrinal justification for the conclusions of the theorist" (Kelly 1999, 474). I will reflect on both of these problems in the conflation of silence as acquiescence in the context of 'targeted killing' debates in Chapter III.

The above critiques link to a Bourdieusian understanding of international law as shaped by power relations, both within and outside of the field of professionals (Bourdieu 1986, 817; see also Bhupinder S. Chimni 2004; B. S. Chimni 2018). Experts within the field of international law can be seen to directly participate in legal knowledge production, for example regarding the processes and technicalities within the legal circumscription of armed drone attacks (Leander 2013; D. Gregory 2011a); not despite but through the specific internal logic of the legal field (Bourdieu 1986, 820). Sociological approaches to international law have thus situated legal knowledge production within the social space in which international lawyers move and have, for example, investigated the biographies of mostly Western, male, upper class international lawyers (Dezalay and Garth 2011; see also D'Aspremont 2012). Building on Bourdieu's analysis of the legal field, silence as acquiescence could thus be analysed as revealing the social division between professionals and lay people (Bourdieu 1986, 829),

which cannot be separated from the power relations which have structured the legal field.

Building on these lines of critique, silence as an analytical lens reveals how customary international law is intricately linked to who can speak. To analyse when and how silence is invoked calls attention to who and what is excluded and rendered legally irrelevant. While statements can more easily be argued to have external signs, which distinguish them as legal acts from the imagined vantage point of observation (when a state representative speaks of an 'act of aggression' in a Security Council debate it could more easily be argued that legal relevance is signified through the statement itself), silence carries no external sign. The apparent self-evidence of what is legal and what is political dissipates; it is not even clear whether silence is an act at all. Because of this, silence reveals clearly how distinctions between 'legal' and 'political' are not given, but are produced, reproduced and renegotiated in different ways, every time an act is discussed – or not discussed.

Rather than focusing on the field of international law professionals however, my dissertation investigates how silence can gain different functions – within as well as across different fields and professions. While in the case of 'targeted killing' debates, for example, silence as acquiescence has often been invoked by international lawyers, it is also thus conceptualised by NGO representatives, policy makers or Human Rights activists when they are requesting governments to "oppose and ban the practice of extrajudicial targeted killings" (EU Parliament, Resolution 2567, 2014, para 2; UN Doc A/68/389, para 79) or are asking "if these targeted killings are illegal, why does Europe keep silent?" (Lucchini, quoted in Regine 2015; ICCT 2016). Within doctrinal international law scholarship, on the other hand, silence can be

understood through alternative functions, as a way of ignoring an act for it not to gain legal significance (D'Amato 1971), or as a diplomatic stance within complex power relations (Lobel 1999a; Gray 2008). Invoking and understanding silence as tacit consent might thus not be fully determined by principles common to a preconceived group of interpreters.

Investigating the different functions of silence and how they are linked to other discursive representations, my dissertation hence focuses less on the social division “between the users of learned codes (e.g. physicians, judges) and simple laypeople” (Bourdieu 1986, 829) and more on the differences between the *ways* in which silence is invoked and connected – or not connected – to other discursive representations (e.g. ‘targeted killing’). Working with Wittgenstein’s concept of language (Wittgenstein 1960; see also Aalberts 2012; Fierke 2002) and discursive approaches to the international (Pin-Fat 2000; Doty 1993b), my project thus analyses the communicative functions silence can assume in practices where “the productive nature of language does not depend on nor necessarily coincide with the motivations, perceptions, intentions or understandings of social actors” (Doty 1993a, 302).

There has been a range of important work in international relations and international law, which investigates the ways in which words perform the reality they invoke, for example when sovereignty claims work to create and legitimise institutional facts around sovereign statehood (Werner and De Wilde 2001; Aalberts 2012; Butler 1997) or when the invocation of security performs the urgency of the securitized utterance, thus moving an issue from the political to a securitized realm (Buzan, Wæver, and De Wilde 1998; Balzacq 2005; Huysmans 2000). This body of scholarship will be particularly important for investigating the

meta-discourse on silence, the way silence has been called into being and used by interpreters to claim tacit consent of the international community, similar to the consensus claims Lianne Boer investigates (Boer 2016). Not just the function of silence, but its discursive existence depends on assumptions of how it is linked to other representations and where, by whom and what speech is expected on. How silence is used thus reveals different sets of assumptions, different ways of engaging with the question of a developing un/lawfulness of ‘targeted killing’.

Using silence as an analytics, my project contributes to existing literature on international law by conceptualising customary international law as a type of language game in which different modalities are at play, a point Chapter II unpacks. The functions of silence serve as a lens in order to reflect on those assumptions and expectations within customary international law debates on an issue which are not determined by legal principles or shared professional assumptions but are linked to decentralised discursive practices. In order to explore the analytical potential of silence for these tasks, the next section discusses how silence has been studied in existing literature on international law and international politics.

1.3. From Silencing to Silence

In modern Western culture, agency is seen as inextricably linked to having a voice, to speaking. In our most basic understandings of the social and political life, the starting point for agency is speech. This goes back to the mythological foundations of life itself: The World was created by God *speaking*. Through speaking, God created light and

darkness, heaven and earth. This is a peculiar understanding of creation, which is not present in non-Judaic cultures. Creation myths in other cultures rely fundamentally on silent forces, on nature, growth, light and blood which *quietly* create the world as we know it (Maitland 2008, 118). The predominance of the spoken word in Christianity (as well as Judaism and Islam) has left its mark on modern understandings of communication. Speech or sound, which is breaking the silence is seen as agency, as that which creates the world; thus the choice of the word ‘Big Bang’ for an event that did not actually make any noise at all (Maitland 2008, 118).

An understanding of speech as agency and silence as “death that threatens the power to make meaning” (Kalamaras 1997, 3) is presupposed on the idea that silence is the absence of language, is somehow outside of discourse, or the opposite of communication in a binary conceptualisation of speech and silence. This section shows that most international law literature thus understands silence as deliberate absence of protest, while more critical scholarship in international law and international relations tends to treat silence as exclusion from partaking in international politics, as a passive position of marginalized voices. I argue that both angles neglect to analyse the processes of how lines are drawn between communicative silence and silence as exclusion.

1.3.1. Silence as Absence of Text

In international law scholarship, the first way in which silence appears as legally relevant is as silence of the law itself. This means silence as a lack of legal texts regarding certain aspects in treaty law. Such silences are perceived as ‘lacunae’ or gaps in treaty law and raise the question of

whether and when they should be interpreted by the court (Van Damme 2009, 129). Questions thus arise as to whether such silences are perceived to have been deliberate or the matter seen as merely forgotten or the regulation considered unnecessary to be spelled out (Van Damme 2009, 111). The court then has to either interpret silence and decide the case on that basis or decline to judge in a *non liquet* declaration (Tammelo 1959, 189).

Silence is often noted and discussed in international law when it disturbs the 'grid' of rules, by leaving gaps and ambiguities. Particularly when there is legal uncertainty, silence on the part of lawmakers is often seen as failure to clarify what the existing law is. The silence of governments on counterterrorism uses of force has thus been noted as a lamentable absence by international law experts who try and judge whether 'targeted killing' and the use of force directly against non-state actors is un/lawful. Government silence appears here as a stumbling block which hinders the clarity of the state of the law. The great danger of such silences lies in the obscurity they create, which erodes the judging capacity of the legal framework. Particularly because international law depends on enforcement by its member states "reluctance to protest (...) has the potential to undermine the legitimacy of the law." (Garwood-Gowers 2011, 288)

International law is derived from either treaty law or customary law. While treaties are written and explicitly agreed upon by those states which are then bound by the treaty, customary international law is not based on explicit consent. It develops more fluidly from consistent state practice and a subjective element of *opinio juris*, which means the interpretation by governments that a practice is following a legal obligation (Villiger 1985, 7:17; Byers 1999, 142). Any judgement on the

basis of customary international law has to interpret the genesis of its development. Examining whether or not customary international law has been changing, the silence of governments then often appears as a question of evidence, a question of whether “the absence of international comment or criticism (...) be interpreted as tacit endorsement.” (Garwood-Gowers 2011, 265).

In those strands of International law scholarship which look at the question of whether particular kinds of practices have become lawful, silence is often mentioned in half sentences, such as the following: “The last two decades have seen a considerable shift. The number of states which claim a right to take forcible anti-terrorist measures has markedly increased, while the willingness of other states to condemn such measures has decreased“ (Tams 2009, 378). Silence is treated as an absence which is noted as potential evidence for tacit consent: “In the area of self-defense, many incidents fail to elicit much of an international response, which could be interpreted as an indicator for legal uncertainty or as tacit acquiescence.” (Reinold 2011, 257).

Depending on the viewpoint and available data of scholars, state silence might be dismissed as evidence and argued to be due to political – not legal – circumstances, or due to a lack of information about a practice (Garwood-Gowers 2011, 282); or it might be used as evidence for acquiescence, as demonstrating acceptance of certain claims or practices (see for example Downes 2004; Murphy 2009). Preoccupied with the question of the legality of a particular issue (e.g. ‘targeted killing’), scholarship on customary international law often focuses on the relevant developments which can be applied to judge the un/lawfulness of particular claims, such as ‘targeted killing’, and silence appears as potential evidence of consent. While the function of silence as

acquiescence itself can become a matter of contestation which reveals diverging understandings of international law (see Bradley/Gulati 2010), most work in this area advances practical suggestions of how to infer consent from the silence of governments (Akehurst 1976, 38; Danilenko 1993, 108; Kammerhofer 2004; Mendelson 1996, 185). It suggests methods to discern the legal intentionality for silence in order to know whether the “failure (...) to lodge effective protest (...) be consolidated as valid legal rights” (Chan 2004, 422) and thus interpreted as consent to a legal position.

There are three problems with the way silence is conceptualised here: First, silence is often analysed in an essentialist way as the opposite of protest (see for example Akehurst 1975,39). Second, silence is primarily treated as a deliberate choice and from that starting point retrieves the likely intentions of governments. As I discuss in more detail in Chapter III, this view risks to miss some important power relations and overlooks the way in which silence as active choice is inextricably linked to silence as exclusion. Third, as previously discussed, the above cited literature on silence tends to assume that the *interpretation* of silence and thus scholarship itself is a form of outside observation of facts. Yet the very existence of silence, as I show, is closely linked to its invocation and interpretation. This then raises many questions about the role of the interpreter and the power dynamics in scholarship itself.

1.3.2. Marginalised Voices

Questions about silence as a form of exclusion and the role of scholarship in interpreting silence are more thoroughly discussed in critical literature (see for a recent overview Dingli 2015). Particularly

feminist scholarship has done a lot of work on investigating silence as powerlessness and the difficult position researchers face when noting and interpreting silences (Ferguson 2003, 52–53; Maggio 2007, 426; Orford 2002). The marginal position in society, faced by women, minorities, or lower classes, motivates researchers to look beyond the spoken or written word since the focus in this literature is on “those who are silenced” (Enloe 2004: 22; see also Hansen 2000). Researchers do not stand outside of this silencing process. This is evoked by Enloe as she speaks of the inability for research to fully tally “the actual amount and the amazing variety of power that are required to keep the voices on the margins from having the right language and enough volume to be heard” (Enloe 2004, 23; see also Orford 2002, 279).

Research is complicit in silencing, as post-colonial scholars have demonstrated in their analysis of the largely western, white, and masculine reading of the international. Silence thus appears as the absence of non-Western contributions to Anglo-American fields which do not often stretch beyond their own linguistic and cultural boundaries (see for instance Hobson 2004; Porras 1994). This is not only silence in the sense of a nominal absence of non-Western authors and schools of thought within Western scholarship (Acharya/Buzan 2007, 295), but also the silencing taking place in fields which are so restricted in their conceptual discourses that they do not or cannot conceive of alternative ways of making sense of the political and legal world. Post-colonial scholars have shown how the underlying assumptions in international law and international relations are often Eurocentric and rooted in world views of progress in which the 'other' figures as the mute recipient of Western developments and is not perceived in its co-constituting agency (Hobson 2007; Anghie 1999, 6). The non-west is studied as part

of the discipline, thus contributing to "the muteness imposed upon the Orient as object" (Said 1985, 93).

Silence in critical perspectives on the international is thus often conceptualised as exclusion from hegemonic, eurocentric discourses which construct both the 'West' and "its silent Other" (Said 1985: 93). As in feminist scholarship, silence is important to measure those voices which are not heard, those perspectives which cannot be understood by dominant epistemologies and those subaltern subjectivities which, in Spivak's words "cannot speak" and which figure as inaccessible blankness within the surrounding records of theorisation (Spivak 1988, 294). Silence is here important not only in that subaltern voices and experiences are excluded from hegemonic discourses but in that the very existence of differences is denied and the language through which alternative experiences could be transmitted is constructed as unintelligible (Dingli 2015, 5; Anghie 1999).

Silence presents a difficult tension for critical scholars. On the one hand, silence conceptualised as exclusion demands an emancipatory programme of opening up space for silenced perspectives and "give[] voice to the marginalised, silenced 'other'" (Agathangelou and Ling 1997, 9; Said 1985, 91). Not connecting the analysis of silence to emancipatory goals would suggest a degree of complicity with the status quo and a hypocrisy of "the first world intellectual masquerading as the absent non-representer who lets the oppressed speak for themselves" (Spivak 1988, 292; see also Maggio 2007). On the other hand, critical scholars are acutely aware of the danger and impossibility of speaking for those who are silenced. Paralleling bell hooks' criticism from an African American woman's perspective, Mohanty criticises feminist IR scholarship for objectifying the Third World Woman in its quest of

speaking for the marginalised (Mohanty 1988). Yet, as Suleri (1992) has pointed out, the logic of "only a black can speak for a black; only a postcolonial subcontinental feminist can adequately represent the lived experience of that culture" (Suleri 1992, 760) carries its own risks of essentialising and silencing. The very construction of the subjectivity of the subaltern *as* subaltern for whom to speak, or for whom to create space to speak because they can only speak for themselves, is complicit in a discourse which further silences them – hence Spivak's conclusion that the subaltern cannot speak.

Trying to give voice to those who are silent presupposes silence as powerlessness and marginalisation (Ferguson 2003). Yet, as sociolinguistic and some discursive studies have pointed out, silence is only contextually meaningful and may work differently in different situations, for example as a means of action against the fixity of hegemonic discourses (Montoya 2000; Ferguson 2003, 56). Echoing Cheryl Glenn: "Not all silence is particularly potent. However, silence is too often read as simple passivity in situations where it has actually taken on an expressive power. Employed as tactical strategy or inhabited in deference to authority, silence resonates loudly along the corridors of purposeful language use" (Glenn 2004, xi).

It thus seems no coincidence that 'obstinate silence' gains such prominence in situations of steep power relations, in court rooms, police stations or class rooms and that powerful actors often penalize silences (Ferguson 2003, 56). Hence has the silence of a primary school child, who refuses to answer when her name is taken for the morning register, become a battle ground which got teachers, parents, school staff and even researchers involved (MacLure/Holmes/Jones/MacRae 2010). It is also because of the non-cooperative potential of silence, that

the 1994 amendment of the British privilege against self-discrimination explicitly states that the court can use the silence of a suspect as proof against them if the suspect fails to mention a fact “which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned” (“Criminal Justice and Public Order Act 1994” n.d. section III.34). Because silence can have an important role in resistance, some researchers have called our attention to silence in order to understand political action beyond the spoken word, particularly when the spoken word is dominated by hegemonic patterns (Clair 1997; Montoya 2000): “Silence as non-participation is threatening to institutional forces in that silence resists whatever demands are made without necessarily opposing” (Ferguson 2003, 56)

While silence certainly can be an outcome of exclusion, the problem of a conflation between silence and voicelessness is to overlook how silence can be actively productive and can be a powerful discursive move. While silence is often associated with suppression, words can also be an outcome of exclusion, and sometimes more so than silences: “Being forced to speak can impose forms of expression and forms of affect on individuals different from the other forms of expression, including a chosen silence that they might have produced.” (Thiesmeyer 2003, 8; Constable 2009, 151). The Miranda rights in the US are thus important in protecting criminal suspects from being pushed to incriminate themselves within a discourse which might be set up for suspects to speak to their disadvantage (Kurzon 1995).

Equating silence with powerlessness runs the risk of reproducing the fixed determination of the silent as marginalised. It could also be argued that it reproduces a Eurocentric idea that the primary pathway towards

agency is speech and participation within – what is perceived and thus reaffirmed to be – dominant 'Western' discourses. This might itself be based on a Western understanding of language that links the act of speaking in a binary way to agency and the act of being silent to exclusion and passiveness (Maitland 2008; Maggio 2007). There is a risk of not grasping the emancipatory and powerful ways in which silence can function and missing instances in which silence is used strategically by different actors in resisting as well as in reproducing power relations.

In daily life conversations we constantly use and interpret silences in active ways which seems to be part of communication, not just the lack of it. We use silence to disregard people, or to gain time, we are silent to not step on other people's toes, to ignore a suggestion we dislike; we think about silences and we talk about silences (Jaworski 1992a; Zerubavel 2006; Kurzon 1995). For the question of silence by states, it seems important to rethink silence and conceptualise it beyond an equation with powerlessness and exclusion. I thus draw on sociolinguistic literature which has advanced frameworks to investigate the different functions of communicative silences. The active role of silence has here been studied as resistance and non-cooperation of actors in courts (Kurzon 1995) and classrooms (MacLure et al. 2010), as a method of protest in silent vigils (Parpart 2010), as punishment and disregard of group members through the silent treatment (Ferguson 2003, 57), as manipulation of issues not to be covered in public discourses (Huckin 2002), as rhetorical control in rituals and ceremonies (Kurzon 2007, 1681), as evasion in interviews (Clayman and Clayman 2001) or strategic concealment (Schröter 2013).

At the same time, silence is deeply linked to its political context and thus produced in asymmetrical relations. It is important to take the silencing

practices into considerations when investigating state silences and the language game of customary international law. Silence can thus be understood as both a centrifugal and a centripetal force in language (Montoya 2000, 853). It is centripetal in the way it excludes voices, issues or ways of speaking which do not adhere to the rules of a particular discourse (Montoya 2000, 853). Yet, silence can also be centrifugal in the way it upsets the rules and expectations, reveals and changes them (Montoya 2000, 854). The next Chapter develops an analytical framework which allows me to trace both the productive functions of silence and silence as exclusion in customary international law formation.

1.4. Conclusion

This Chapter has suggested to use the communicative roles of silence, in order to examine what is listened to and how this listening takes place in customary international law debates. Building on critical, feminist and Third World Approaches to international law and international politics, silence thus highlights different forms of silencing, of being prevented from speaking or not listened to. I argued that these silencing dynamics are not only important in the colonial legacy of the acquiescence doctrine but are still relevant in intricate forms of silencing to date, in which scholarship itself participates. Silence, I argue, particularly reveals the active role of those normally understood as observers of state acts, because silence cannot be argued to carry any external sign. It thus shows clearly how distinctions between ‘legal’ and ‘political’ are not given, but are produced, reproduced and renegotiated in different ways, every time something is discussed – or not discussed.

Rather than assuming that state silence is an objectively given fact, I thus propose to investigate *how* (based on what assumptions), silence can be invoked and can work in a particular, communicative way. Silence as a hearing test then also offers a new angle on current ‘targeted killing’ debates. It raises the question *how* ‘targeted killing’ can come to be regarded as something legal which should be discussed. Rather than focusing on the ‘targeted killing’ practices and justifications by a few powerful actors (such as the US and Israeli government), silence shifts analytical focus towards wider meaning-making processes. It directs our attention towards those who have been claimed to be silent – and those who have (not) listened.

Silence thus calls for a moment of reflection in legal debates on the un/lawfulness of an issue, such as ‘targeted killing’. Revealing the power dynamics regarding who can speak and what is listened to, silence raises the question of how something can gain active communicative functions – how the line can be drawn (and can be drawn differently) between communicative silence and silence as exclusion. The next Chapter thus develops a framework for analytically grasping both communicative silence and silence as exclusion. Building on the understanding of speech and text as part of a language game through which they gain functions (Wittgenstein 1960, 23) the next Chapter develops an analytical framework for silence, which Chapter III, IV and V will apply to current ‘targeted killing’ debates in order to learn more about customary international law.

“ This space of time is organized
. We need not fear these silences, --
We may love them”⁵

⁵ John Cage ‘Lecture on Nothing’, printed in Cage (1959) *Silence*, p. 109

Chapter II

Silence as an Analytical Lens

In John Cage's famous music piece 4'33", a musician goes onto stage and does not play a single note for four minutes and 33 seconds. In the original 1952 performance in New York, the pianist set up the sheet music, closed the lid of the piano and set a timer for the duration of this silence, opening and closing the lid in between the three movements (Dodd 2017). For four and a half minutes (and 3 seconds), the piece by John Cage disturbs the expectations of the context, which is framed through the performance of a musician, sitting at an instrument in a concert hall – not playing. The piece was received with irritation, outrage and bewilderment and has led to a heated debate on whether it can be called a piece of music at all; coming from an understanding of music as organised sound, silence is at first glance the other, that which is outside of music – even though silences are, of course, fundamental for any piece of music as well (Kania 2010; Kauffman 2011).

This is similar to how silence is conceptualised as absence of voice in most literature on international politics and law, a point the previous Chapter illustrated. The notion of silence as that which is outside of

speech implicitly correlates words with meaning and silence as the binary opposite. This approach neglects to investigate the context through which words *gain* different functions, as has been highlighted by constructivist and poststructuralist scholars since the linguistic turn. Building on Wittgenstein's philosophy of language, I suggest not to focus on the meaning but on the functions of language and conceptualise how silence as well can gain communicative roles. Rather than arguing that silence is, or is not language, this Chapter investigates how silence can *function* in communicative ways and how it can play different roles in the international realm, for example as a diplomatic stance, to leave the question of legality open, or as acquiescence to a claim.

At an empirical level, this means that I am not analysing whether there *is* silence on 'targeted killing' or why there is silence, but (a) *how* it is possible that silence can gain communicative functions (for example in current counterterrorism discourses) and (b) what silence can *do* – the different functions it can assume. Following these lines of questioning allows to use silence in order to problematize some taken-for-granted assumptions in recent counterterrorism debates and customary international law more generally. It reveals how the fact "that meaning does often appear to be fixed and decideable rather than an infinite play of signifiers is indicative of the workings of power" (Doty 1993a, 302).

The first part of this Chapter develops an analytical framework in order to examine how silence can gain communicative functions. Silence is not usually set as explicitly on stage as in the piece 4'33". In most discourses, particularly in the international realm, it is less clear whether an absence of words has been intended or whether there actually has been silence. Zooming into the epistemological questions of knowing

about silence in the international realm, I develop an analytical framework in order to trace the assumptions according to which the line between communicative silence on the one hand, and silence as exclusion on the other hand, is drawn. Building on sociolinguistic and discursive studies of silence, I suggest four parameters of communicative silence: The presence of a prompt, the perceived deliberateness of silence, the expectation of speech and the assumption of relevance by those who note, invoke and interpret silence. The point of this framework is not to determine whether there *is* communicatively meaningful silence on ‘targeted killing’ but to enable me to analyse how the line can and has been drawn and thus to show the underlying assumptions without which silence would not be noted in the first place. I then investigate the different communicative functions silence can have in inter-state relations, such as ignoring a claim, diplomatically avoiding conflict, postponing a decision, creating ambiguity, or tacitly consenting to a claim.

Silence has no overt textual form and there is no surface to which claims of its meaning could be anchored, which is why it reveals underlying (and at times banal) assumptions. Building on Wittgenstein’s philosophy of language, the second part of this Chapter theorises customary international law as a type of language game which has different modalities. The particular function silence can gain (such as disregard of a claim or acquiescence to it) can thus be used to investigate different sets of assumptions within the language game of customary international law. The assumptions underlying the different modalities are not determined by legal principles and often remain implicit and self-evident; they thus reveal lines of contestations and forms of agency which would not otherwise be visible.

The third part of this Chapter explains in more detail the selection of documents and methodological assumptions in approaching silences in the context of ‘targeted killing’ debates. I briefly discuss the methodological problems of how most international law literature approaches the question of state silence by screening the reactions to a range of cases. My main point is not to argue that these cases are not relevant; nor that there has not actually been silence as a response to them. Rather I am concerned with *how* silence claims around these cases have been made; that is, the implicit assumptions the invocation of silence already rely on and what is excluded in order to draw the line for communicative silence. Discussing the problems of focusing on particular sites and types of documents within my own project, I show how this relates to a wider epistemological question regarding the possibility of knowing about silences and the role of scholarship in legal knowledge production.

2.1. Drawing a Line

In John Cage’s piece 4’33” the silence of the pianist is used by Cage in order to show that “there is no such thing as silence” (Cage, cited in Dodd 2017, 6). What John Cage upsets and brings to the fore through the piece are the assumptions of the context of the performance, through which the silence of 4’33” gains its impact and is noted in the first place. The piece underlines the expectations of the audience and deconstructs what the audience is. During those four minutes and 33 seconds, the entire hall becomes part of the performance. Every cough in the room is noticed, the sound of people shifting, chairs creaking, the clock ticking, etc. The pianist’s silence highlights these sounds and in

doing so questions the role of the audience. Upsetting the expectations of what should be heard and what is regarded relevant, the silence of the audience (which in a performance of Beethoven's fifth symphony would be self-evident) itself moves into the spotlight for four and a half minutes and three seconds.

This section engages with the question of how silence can gain communicative function at all, that is, how the silence of particular voices at particular times can come to be understood to be communicative. Investigating the underlying assumptions through which silence can *become* communicative, thus directs our attention towards the power relations at play in the act of drawing an interpretive line between communicative silence and silence-as-absence (the self-evident exclusion of 'irrelevant' utterances). I build on sociolinguistic and discursive studies of silence, in order to develop an analytical framework of four contextual parameters which determine the communicative function of silence. The point of this is not for me to draw the line at which silence can be seen as having communicative function, but to analyse the assumptions through which the line is drawn (such as in silence claims around recent counterterrorism discourses).

2.1.1. Silence As Exclusion

Arguing that "there is no such thing as silence" (Cage, cited in Dodd 2017, 6) expresses how silence can only be noticed by excluding a range of utterances. As an absence claim, the invocation of silence depends fundamentally on the limits of what is listened to, the range of voices from which speech is expected, the issues which are regarded relevant.

Silence as a form of exclusion has been called ‘silencing’, defined as the process through which actors, voices, perspectives, issues, terms etc. are excluded from certain discourses (Thiesmeyer 2003). This can take covert forms since “silencing is a process that works best when disguised” (Thiesmeyer 2003, 2) and entails forms of exclusion which needs not be coercive and are often not conscious at all. Silencing is, however, always linked to power relations and exercises “control over the bounds of acceptable discourse” (Zerubavel 2006, 36).

The perhaps most obvious silence as exclusion is that of (i) particular actors and voices. This kind of exclusion gains much emphasis in feminist and anti-racist scholarship on silence which investigates how women and people of colour are denied access to discourses or are belittled, ridiculed, not taken seriously – in short not heard – if they do participate (see for example De Behar 1995). In international law, the exclusion of actors and voices often takes place because of their status, most notably that of sovereign statehood. This silence has been formative for international law through its colonial legacy, determining state sovereignty as a process which excludes the non-European world, not only from claiming certain rights of international law, but from having any legally recognizable voice in the first place (Anghie 1999, 3). In current counterterrorism discourses, this is for example relevant when vocal opposition to ‘targeted killing’ is not registered because actors lack sovereign statehood, such as the protest by the Peshawar High Court in Pakistan (Peshawar High Court 2013) or the EU Parliament (European Parliament 2014).

There is also the exclusion of (ii) certain issues. This is most extreme in the case of censorship in authoritarian regimes, or in the case of social taboos or conspiracies of silence (Thiesmeyer 2003; Zerubavel 2006).

Taboos which cannot be talked about (such as domestic violence, or sexual assault) can protect perpetrators by isolating the victims and thus support the status quo. Silencing is often seen in a normative way as something negative and violent, a tool of suppressing the disempowered. Yet, it can also have empowering repercussions, for example when sexist or racist comments are excluded as inappropriate in some discursive settings. Silence as absence produces and reflects the implicit rules of a particular discourse, which are often taken for granted.

In the context of customary international law formation, the exclusion of particular issues is important in two ways. First, state representatives are under political pressure regarding what they can say or protest against, which is also linked to who they can speak up against. The bounds of that discourse changes over time. As I show in Chapter IV, it was for example normal in Security Council debates in the 1980s to openly critique US counterterrorism practices as forms of ‘imperialism’ or ‘state terrorism’ (see for example UN Doc S/PV.2675). This form of protest against US practices seems to have decreased after the end of the Cold War. Second, international law interpreters are restricted (or restrict themselves) in the issues they talk about, the voices they take into consideration and the words and phrases they can use without, perhaps, losing professional reputation (D’Aspremont 2012, 586; Johnstone 2003, 445).

This leads to the exclusion of (iii) phrasings and forms of speaking. The silencing of expression already exercises an inherent bias towards particular forms of speech that exclude others, leading Maggio to cynically note that “the subaltern can speak as long as they speak in a ‘language’ that is already recognized by the dominant culture of the

West” (Maggio 2007, 431). Not all statements which are made by state representatives are noted by scholars and experts. They need to take place in particular settings (e.g. the Security Council) and even within a Security Council debate some statements will not be noted in legal language games, a point which Chapter III addresses in more detail. There might be certain phrases or wordings which cannot be used and/or will not be noted because they are seen as ‘political’ as opposed to others which are considered legal and are particularly looked for (e.g. ‘Act of aggression’, ‘use of force’). Silence can thus be helpful to trace how what is considered legal in the first place is (re-)produced through its invocation.

Silencing in international law formation is highly political and perhaps because of that is itself often excluded from legal inquiry. Yet, silence-as-absence is not just a question of power politics in the sense of powerful states silencing other actors but is performed through taken-for-granted assumptions about the legal and political world by scholars, journalists, courts and other actors writing on issues such as the un/lawfulness of ‘targeted killing’. Silence-as-absence is thus fundamental in any invocation of legal principles and in creating what it is, that is regarded as legally relevant (or not) in the first place. Examining communicative silence then also reveals the assumptions which determine what has already been excluded.

Silence only assumes communicative function if it is perceived *not* to be silence as exclusion. This is crucial for silence claims in the context of recent counterterrorism use of force. As the following Chapters show, silence in this context always depend on the assumptions which determine what is listened to. While some of the assumptions through which silence gains communicative function are based on explicit

principles (such as the states as the primary voices to listen to), other assumptions are more implicit and political (for example at which forum speech is expected, in which time frame, on what issues). In order to analyse how lines are drawn between communicative silence and silence-as-absence, the next section builds on sociolinguistic and discursive studies of silence and develops four contextual parameters for communicative silence.

2.1.2. Communicative Silence

Silence can be an outcome of marginalisation, a passive position due to exclusion or suppression. Yet, as Cheryl Glenn has pointed out “the rhetorical tradition, long preoccupied with written and spoken rhetorics, has for too long ignored the rhetorical powers of silence”(Glenn 2004, 2). Silence can be a strategic choice, a communicative move by powerful actors, such as governments – but, again, not always. Most governments are silent about most issues most of the time. Yet, not all of these silences are noted by anybody at all or discussed as tacit consent. How do some silences gain signalling function while others are not even noted? The following section builds on sociolinguistic and discursive approaches to silence, and in particular on Schröter’s (2013) study on silence in political discourses in order to propose four parameters for silence to assume a signalling function: The (i) assumed presence of a prompt; (ii) the perceived deliberateness of silence; (iii) the expectation of speech and (iv) the assumption of relevance. As the following section shows, different configurations of these parameters not only determine whether silence is communicative, but also link to the function silence

assumes. Silence can, for example, work to ignore a prompt by not denoting its relevance.

For silence to be communicative it is often conceptualised as a reaction, a second move in an adjacent pair. The prompt is a question, which receives no answer, a claim or action which gains no reaction (Kurzon 1995). The prompt can be seen as a marker or indicator for the ensuing silence. Someone's non-response to an email, for example, is only communicative if they are seen to have received the first email. In customary international law, the presence of the prompt is crucial because acquiescence is, by its definition, a re-action to something. Silence can only work as acquiescence if there is seen to be a prompt and if the silence states are seen to have had knowledge of that prompt. As the ICJ puts it in *Malaysia vs. Singapore*: "The absence of reaction may well amount to acquiescence. (...) That is to say, silence may also speak, but only if the conduct of the other State calls for a response" (International Court of Justice 2008, para 121).

Second, for silence to be communicative it needs to be perceived as a deliberate act as opposed to being prevented from speaking through the circumstances (Schröter 2013, 15; see also Glenn 2004, 13; Ephratt 2008). The perceived deliberateness of silence requires the silent actors to have had the possibility and the ability to speak (Huckin 2002, 355; Schröter 2013, 15). If, for example, you ask your new-born nephew whether he wants to become an academic when he grows up, his silence will not be perceived as deliberate. For international law, perceived deliberateness is important when trying to retrieve the intentionality of government silences. In international Court cases this often appears as the question whether government silence is seen as a legal expression or due to the "mere failure to mention a matter" (ICJ 1989, para 54). As

I show in Chapter III, the question regarding (perceived) deliberateness is thus in international law debates often divorced from power differentials in the political and discursive context which might make it impossible to speak.

Communicative silence is relational and depends on the expectation of speech by the interpreters. While silence exists logically whenever a potential speaker decides to be silent, it only becomes communicative when it is noted as such by someone else (Schröter 2013, 31). For silence to be registered and to have communicative function, there have to be other actors with an *expectation of speech* – such as the audience in John Cage’s piece 4’33”. The third parameter, the expectation of speech, varies greatly depending on the context. It is, for example, important for the silence in 4’33” to take place within the context of a traditional concert hall setting, in which it is framed by the artist through opening the sheet music, putting her glasses on, raising her hands, which shows the deliberateness of silence and raises an expectation in the audience (Kania 2010, 346; Dodd 2017, 3; Kauffman 2011). If the piece 4’33” was performed by a traveller on one of the street pianos which have been put up at train stations, it is likely that nobody would notice the performance.

For the acquiescence claim this is important, because state silence has to be noted by other actors, in order to be discussed in meetings, scholarly articles, court decisions or expert opinions. The disappointed speech expectation by other governments, legal practitioners, scholars or the media is central for state silence to gain any communicative functions at all. Silence is thus always a question about the way others listen and points to power relations in a more decentralised way, than just the power politics at the inter-state system: “Like speech, the

meaning of silence depends on a power differential that exists in every rhetorical situation: who can speak, who must remain silent, who listens, and what those listeners can do” (Glenn 2004, 9).

Fourth, the communicative functions of silence depends on assumptions of *relevance* within that discursive context (Huckin 2002; Schröter 2013). Only if silence regarding the prompt is seen to be relevant by the interpreters will there be an expectation of speech. As Schröter illustrates as an example, a politician who got divorced fifty years ago in Germany would have been expected to speak about the divorce. Otherwise the unsaid would have provoked a political scandal. Today, a divorce – and silence regarding a divorce – would not normally be regarded as relevant for the role as politician in Germany (Schröter 2013). Assumptions of relevance thus influence the expectation of speech and impact on whether or not silence becomes communicative.

For international law, relevance of the unsaid appears, for example, as the question of whether the issue which is not talked about is seen as legal (not political or habitual). This is crucial for the question of armed drone attacks and acquiescence. As I discuss in Chapter III and IV, if the claims and practices around ‘targeted killing’ are not perceived as legally relevant, state silence would not be discussed as acquiescence. The role of silence thus further underlines the importance of how practices such as armed drone attacks are framed as legally relevant, proposing a change in customary international law, and not as, for example, an unlawful assassination (see for a similar discussion Krasmann 2012; Leander 2013; Grayson 2012). How these acts are construed not only influences how legitimate they appear but sets the debate up in a particular way – through which silence can function as acquiescence.

Particularly the first parameter (the nature of the prompt) plays a big role within most legal discussions regarding state silence and its legal quality, a point which the next Chapter unpacks in more detail. What is often neglected in these discussions, however, are the assumptions of relevance and deliberateness and the expectations of speech by the interpreters themselves, without which silence would not be noted at all. My project engages particularly with these parameters in order to demonstrate how any discussion of silence as acquiescence ultimately links to the assumptions through which acts are noted and interpreted. Revealing these assumptions in current counterterrorism discourses then shows “how this ‘reality’ is produced and maintained and how it makes various practices possible” (Doty 1993a, 303).

The parameters above indicate that any struggle around the interpretation of silence already reflects a struggle around a particular representation of the context and the underlying assumptions which that representation reflects (e.g. an armed drone attack as a ‘targeted killing’ rather than an assassination). Silence being noted as communicative thus reveals a lot about the set of assumptions within which it is used, invoked or interpreted: It reveals what is regarded as relevant, who is seen as a speaking actor and what is expected (and not expected) to be said. The analytical distinction between silence as absence and communicative silence is open to interpretation (and thus open to political struggles) and the line can be drawn at different points. The purpose of my research is not to determine the line at which silence should be seen as having communicative function. I am rather interested in the act of drawing the line itself; how it has been drawn in the language game of customary international law (that is, the

assumptions necessary for a silence claim) and the political effects of how it can assume *different* functions, a point the next section addresses.

2.1.3. Functions of Silence in Inter-State Relations

There is not any given moment which encapsulates silence in the same way a statement would, or which could be referenced as such. Instead silence always remains ambiguous. This does not mean, however, that silence has no communicative functions. As this section will show, it is often this very ambiguity which makes silence effective as a communicative tool. As Kennan Ferguson has put it: "Inasfar as silence cannot be literalized or universalized, it is not reducible to one singular function. If silence was strictly resistant, or oppressive, it could be neatly categorized as salutary or sinister; instead it both embodies and transcends these neat categorizations" (Ferguson 2003, 58) Building on sociolinguistic and discursive studies of silence, this section suggests different communicative functions silence might gain in the international realm, from ignoring or disregarding something, to creating ambiguity about rules, postponing a decision, maintaining a neutral stance and avoiding conflict, to tacitly agreeing to something.

Silence can be a form of resistance within a discourse to "discomfit those who regulate social behaviour with speech" (Ferguson 2003, 56). Investigating silences in interviews, Clayman and Clayman have pointed to the strong social norm of speaking and how silence can function to disregard certain claims, prompts or speakers. Take for example the silence of a teacher following a provoking comment of a student, or the silence of the whole dinner table after a politically incorrect comment by grandfather. Here, silence might actually work (depending on the

discursive context) to utterly disregard the prompt. This is why silence can be seen as impolite in social interactions. Clayman and Clayman argue that a refusal to answer conveys the meaning that it was the question which was inappropriate. Silence can thus express disregard to a prompt or question, demonstrating that it is not relevant and unworthy of response (Clayman and Clayman 2001, 422).

Silence as disregard can be communicated by explicitly framing silence. Hence for example the silence of the representative of the United Arab Emirates in a Security Council debate on the US bombing of Libya: “I would have preferred to speak at greater length and to answer the arguments and evidence adduced, if there had been any point in doing so.” (UN Doc S/PV.2674, at 4). Or take the following quote by Edward Said regarding some comments he had received on his research: “Other comments – such as (...) – struck me as superficial and there seems no point in even responding to them.” (Said 1985: 90).

Investigating the process through which issues gain discursive existence, Bourdieu has pointed to the importance of whether something is translated into legal language, thus becoming an object of juridical debate (Bourdieu 1986, 835). As D’Aspremont put it: “Indeed, in international law, naming is what produces knowledge” (D’Aspremont 2012, 582). Silence can thus work to denote the irrelevance of an issue in a language game. It is this function of silence, which Koskeniemi (1999) refers to in the context of the International Court of Justice’s silence regarding the decision on the legality of nuclear weapons. He argues that translating the question into juridical language would have lifted the matter “onto the level of judicial reason” (Koskeniemi 1999, 496). The very act of expressing this matter in legal language would have implied a certain legality and opened up loopholes and legal

controversies, which is why Koskenniemi considers the silence of the Court “a beneficial silence” (Koskenniemi 1999, 497).

Silence can also work to create ambiguity. This might be the reason why international lawyers are often wary of the silence of states. Particularly when there is legal uncertainty, silence is often seen as a failure to clarify what the existing law is. It is in this context that Judge Simma lamented in his separate opinion the silence of the ICJ judgement 2005. Not disagreeing with the Court’s Judgement he voiced concern about the fact that the ICJ missed the chance of clarifying some of the uncertainties surrounding the question of use of force against non-state actors. As Simma puts it: “Let me emphasize at the outset that I agree with everything the Court is saying in its Judgement. Rather, what I am concerned about are certain issues on which the Court decided to say nothing.” (ICJ 2005, *DRC v. Uganda*, Separate Opinion of Judge Simma, para 1) Silence appears here as a stumbling block which hinders the textual clarity of the state of the law. Coming from a ‘courtroom logic’, the great danger of such silences lies in the obscurity they create (Garwood-Gowers 2011, 288).

Ambiguity can be used strategically as a source of power which allows for flexibility and case-by-case decisions in international institutions (Best 2012). Similar to secrecy, silence can thus be a strategy of control which allows more leeway for experts (Thiesmeyer 2003). Public statements can thus tie actors to a given policy course. This is why foreign policy literature (see for example Fearon 1997) speaks of the ‘audience cost’ of public statements, i.e. costs which would occur if a state representative openly advanced a position, creating difficulties to later change the course they proposed (Hansen 2015). Silences are crucial in order to avoid being bound by statements made in the past

and to escape ‘linguistic traps’ (Mattern 2005, 97; Johnstone 2003, 468). In inter-state relations such silences play an important role, as for example in 2001 when the US government refused to apologise for the downing of the U.S. spy plane in Chinese waters where “the crisis was prolonged over weeks by demands of the Chinese government that the United States apologize for its acts, while the United States refused to do so” (Fierke 2002, 347).

Refraining from public statements can also prevent *other* actors from becoming trapped, for example by having to respond to a publicly voiced objection to their foreign policies (Kurizaki 2004). Silence can thus work to avoid open conflict and to sustain relationships in the face of disagreement (Ferguson 2003, 50). For state representatives, this is an important function of silence since diplomatic relationships necessarily need to work on the basis of fundamental disagreement in order to reach compromises in other areas. It is thus an inherent part of diplomacy to learn not only how to phrase issues and what to say, but also to learn what *not* to say – particularly in public statements (Burhanudeen 2006). Silence by governments regarding certain issues can work to ensure diplomatic relationships in order to enable agreements in complicated, political alliance systems (See for example Van Raemdonck 2012; Scott 2001). As Dworkin argues in the case of silence of EU governments on drone attacks: “Torn between an evident reluctance to accuse Obama of breaking international law and an unwillingness to endorse his policies, divided in part among themselves and in some cases bound by close intelligence relationships to the US, European countries have remained essentially disengaged as the era of drone warfare has dawned.”(Dworkin 2013, 2).

Silence can also work to sustain a relationship by withholding information which could undermine the reputation of the silent actor – within that discursive context. The Jesuit world map by Ricci, which was published in Peking in 1602, for example, is silent about sacred places of Islam while carefully annotating Christian places in order to portray a unified, Christian Occident (Harley 1988, 59). Secrecy, or the withholding of relevant information from others, is one of the most discussed silences in the political realm (Schröter 2013; Kearns 2016). It gains discursive prominence as scandals in the context of questionable conduct which was not revealed by those responsible. Underlying these discussions of silence is often the notion that this silence itself might be seen to condone the acts and acquiescence in them (Harlos and Pinder 2001).

Silence can thus also work as tacit consent to a practice or claim. When the Chair in a board meeting asks “any objections?” and there is no response within a certain time period, the silence of members will function as tacit consent and can sometimes be included into the minutes of that meeting. Take for example this record from a Security Council meeting (UN Doc S/PV.2673, at 3):

“If there is no objection, I shall take it that the Council decides to invite Mr. Clovis Makrone under rule 39 of its provisional rules of procedure.

There being no objection, it is so decided.”

Silence is here a way of inferring consent to a suggestion. The majority of customary international laws develop through the active claims and practices of a small number of governments and the silence (interpreted as acquiescence) by the majority of governments (Mendelson 1996;

Kammerhofer 2004). This can actually be one of the main reasons why customary international law is still so important today. Treaty negotiation can be expensive, time consuming and at times not feasible between certain governments (for example because of pressure from domestic actors or strategic considerations). Customary international law can be seen to constitute a more feasible way of regulating international issues precisely because of its implicit character which necessitates no international negotiations or domestic ratifications; instead it can be formed on the basis of acquiescence (MacGibbon 1954, 184; Bradley/Gulati 2010, 209).

This section has proposed a number of different ways in which silence is at work in inter-state relations, as a way to resist dominant discourses, to ignore an issue and keep it out of a particular discourse, to post-pone a decision, to create ambiguity and maintain action space, to sustain a relationship and avoid open conflict, or to tacitly consent to a proposition. The same silence can have different functions, depending on the context and the assumptions of those who interpret it. The next section explains how I build on Wittgenstein's philosophy of language in order to theorise customary international law as a language game within which silence can gain three main functions: To confirm the status quo, to leave the question of legality open, or to tacitly consent to a prompt.

2.2. The Language Game of Customary International Law

In order to analytically distinguish between silence as absence and communicative silence, the last section built on sociolinguistic and discursive scholarship on silence and proposed four parameters which highlight the assumptions underlying silence to become communicative. After having proposed a framework which enables me to analyse (a) how silence gains communicative functions and (b) what silence can do – the different functions it might assume in inter-state relations, this section explains the theoretical framework through which I conceptualise silence as a move within the language game of customary international law. This framework is important for the following Chapters to show different modalities at work in current legal discussions on counterterrorism use of force – and what this reveals about legal knowledge production.

2.2.1. A Move in a Language Game

The bewildered reception of Cage's piece 4'33" has prompted a debate by music experts regarding the nature of music. In a paper called 'Silent Music', Kania argues that silences are integral to any piece of music and "the character of a melody would be dramatically changed without its constituent rests" (Kania 2010, 344). If music is a priori defined as only that which is sound, the crucial role of silence is neglected. Kania suggests to instead grasp music within the context in which it takes place, including what the audience is listening to and the intentionality

of a piece as something to be heard. Through this understanding of music, silences are heard in their productive role and 4'33" can be understood as not just a theatrical performance but as constituting a piece of sound art (Kania 2010, 348).

This shift towards the function of sounds within a particular context resonates with a Wittgensteinian understandings of language (Wittgenstein 1960; see also Fierke 2002; Aalberts 2012). Challenging the idea of language as reflecting material reality, shows how concepts are produced within a particular discursive context and are themselves *productive* of "things defined by the discourse" (Milliken 1999, 229; Werner and De Wilde 2001; Aalberts 2012). Rather than working with fixed understandings of concepts as having substance, this approach directs our attention towards the processes of meaning-making and the power relations underlying these processes (Guillaume 2011, 38; Doty 1993a). If words are understood to be situated in a particular context, the assumption of fixed meaning is dissolved and our attention is directed towards the different *uses* of a concept, underneath which there is no inherent substance.

Wittgenstein explains this with the example of the word 'following' or 'being guided' [geführt werden]. You might follow someone when dancing in a ballroom, intuitively trying to anticipate their next step; you might follow a rule when filling in a table; you could follow a friend when going for a walk; you can follow a pattern when drawing on a piece of paper (Wittgenstein 1960, 172). All these uses of the word 'follow' have similarities with each other, but there is not one exclusive point they all have in common. Wittgenstein argues instead that they share "family resemblances" (Wittgenstein 1960, 67). In fact, Wittgenstein argues, searching for an inherent meaning of words by

looking beyond the ways in which that word is *used* in language games, is like stripping an artichoke of its layers in order to find the artichoke (Wittgenstein 1960, 164).

A non-essentialist understanding of language is important in order to be able to trace the communicative functions which silence can gain (Jaworski 1992b). Shifting away from an inherent meaning of words to an investigation of what *functions* particular terms can assume, thus opens the way to analyse how silence as well can gain different roles. Not assuming that words have meaning and silences are meaningless, words gain meaning only through their use - as silences can under particular circumstances. My approach thus follows what Jaworski (1992) calls a pragmatic approach to silence which does not aim to reach the ultimate definition of silence but is based on an understanding of discourse as situated within a particular set of assumptions. Silence does not have one inherent substance or meaning which could be ontologically grasped as opposed to text or speech in a binary fashion (Jaworski 1992b, 1:134). Instead, silences can live through text, in euphemisms, implications, rumours, evasions, exclusions. This is illustrated in Clayman's (2001) study of politicians in interviews who are responding and yet are silent in relation to the question.

Wittgenstein understands the use of words as a move within a language game. Like a move on a chess board the role of words depends on the context of the other pawns on the board, but also on the social practices which have defined the game (Wittgenstein 1960, 197). Similar to asking what a piece of chess is (e.g. the king), the question should be how a word can be used (i.e. what the king can *do* on the chess board) (Wittgenstein 1960, 108). This concept of language game has been used by scholars in order to draw attention to how utterances in the

international realm are always situated within a particular meaning-making context (Fierke 2002; Aalberts 2012). Language games thus show the rules of interaction in different contextual settings and the assumptions through which utterances are understood, such as within the Cold War balance of power setting, which must themselves be analysed (Fierke 2002, 338; Fierke and Wiener 1999): “If our language does not provide mere labels for a single reality, but is constitutive of multiple possibilities, the language of these games must become the *object of analysis*” (Fierke 2002, 341, emphasis in the original).

Wittgenstein himself explicitly refuses to define what a language game is or to set out a range of conditions which a language game needs to exhibit, since that would contradict the main point of his analysis (Wittgenstein 1960, 65). There is, for Wittgenstein, no feature which all language games have in common. He compares this to different uses of the word 'game'. While there are certain similarities between activities called card games, board games, ball games, etc., some of these similarities disappear in other games (Wittgenstein 1960, 66). There might be an aspect of fun and playfulness in some games; but what about Russian Roulette? There might be an aspect of winning and losing in many other games, or a set of rules which defines the game; but what about a child playing house by itself? Like the term game (and any other word), the concept 'language game' cannot be defined through an inherent meaning but gains traction through its different applications (Wittgenstein 1960, 66).

I use the concept language game in order to highlight the importance of implicit assumptions through which communicative moves (such as silence) *gain* different functions. Customary international law as a type of language game can be understood to follow a certain logic of

deducing legal rules and to communicate, invoke, dismiss, question, or assume the legal relevance of acts (and non-acts) in light of what these non/acts mean for the interpretation of a rule. The central source of acts is what states have said and done⁶. My focus, however, is not on what characterizes customary international law in comparison to other language games, but on how the language game of customary international law can be played differently within the confines of such rules. The lens of silence underlines the nuances within customary international law, as in the case of recent ‘targeted killing’ debates, since the meaning and existence of silence is dependent on particular assumptions of those who participate within the language game. Following Roxanne Lynn Doty’s call for “critical recognition and acceptance of indeterminacy and contingency as integral [to research]” (Doty 1997, 379), my point is not to establish what the rules of customary international within a set group of players is, but to trace the assumptions underlying different modalities of the language game of customary international law.

2.2.2. Modalities of Playing with Silence

Wittgenstein uses the example of two situations at a construction site to illustrate the different functions the same word or phrase can assume. The first example is of a person who surveys building material and calls

⁶ The exclusive focus on sovereign states as the law-makers is not necessarily part of the language game of customary international law. As I will discuss in Chapter III and V, this rule has also changed considerably over time; see for an analysis of the colonial history of sovereign statehood as the criterium for participation in law formation (Anghie 1999) as well as the recent article by Chimni (2018).

out 'five bricks', 'ten ledges' etc. while another person takes note. The second example is of a person calling out 'five bricks' and the other person goes and gets five bricks. While both situations involve the same set of people and the same understanding of what bricks are, the expression 'five bricks' gains two different functions – description or command (Wittgenstein 1960, 21). I similarly use the functions which silence can assume as a way of differentiating between three modalities of customary international law as a language game: The modality of evidence, in which silence works as acquiescence, the modality of status quo in which silence functions to ignore a prompt, and the modality of context, within which silence works to leave the question of legality open. This section briefly presents the three modalities on the basis of the parameters for communicative silence developed above. The following Chapters will then operationalise them in the context of recent counterterrorism debates.

Within, what I will call the *modality of evidence*, the question of silence is a question of evidence in relation to a state practice which is already framed as a prompt raising an expectation of speech. The modality of evidence either equates silence with tacit consent or more carefully draws on the requirements for acquiescence in order to argue that this silence can/not be read as tacit consent (this will be unpacked in more detail in Chapter III). While the modality of evidence might conclude that there has been no acquiescence, it already assumes a potential change. It builds on (and at the same time reproduces) an assumption of legal relevance of the prompt – to which silence is conceptualised as a response to – and maintains a high expectation of speech.

The understanding of silence as acquiescence might be most obvious in customary international law, because discussions about the evolving

un/lawfulness of an issue often surface when the question of change has already risen. Yet, the language game of customary international law also and inherently invokes past practices and long-term continuities. Within the *modality of status quo*, silence can work in order to disregard a prompt and denote its legal irrelevance within the language game of customary international law. If acts (such as armed drone attacks) are viewed from the standpoint of the modality of status quo, they are *prima facie* made sense of according to existing legal frameworks and are not perceived as legally relevant in the sense of challenging existing international law. Silence then functions as confirmation of the status quo of existing customary international interpretations, and can even be a way to disregard and ignore a prompt for it *not* to gain relevance within the language game of customary international law, a way for governments, for example, to ignore a practice of other states (D'Amato 1971, 101).

Rather than working as consent to a prompt or as denegation of it, silence can also function to leave the question of il/legality open. If speech expectations are not fixed to the prompt, but are situated in a complicated, shifting context in which actors might have various reasons for silence (for example because of political pressure or for diplomatic reasons), silence can work as a neutral stance and a waiting move. Within what I call the *modality of context*, silence functions as a way of keeping the question of legality open because speech and silence are not grasped as absolute binaries but are always situated within a complicated context. The expectation of speech is lower and dependent on the question of deliberateness within a particular discursive context. These three modalities are not absolute or exhaustive categories but serve as an analytical device which allows me to trace different ways of

engaging in the language game of customary international law. I am thus not focusing on those aspects which groups of professionals would share (e.g. the *habitus* or *doxa*) but on precisely those assumptions which do not depend on the field or the professional status of interpreters. I thus differentiate the modalities not by actors or their status (e.g. scholars, NGOs, state representatives, journalists, legal experts, citizens) but by the converse functions of silence. Through these functions I trace different sets of implicit assumptions through which the language game on a particular issue (such as self-defence against non-state actors) is set up – which allows me to empirically trace fundamental contestations regarding current ‘targeted killing’ debates.

Theorising customary international law as a language game (rather than a set of principles) thus opens analytical space to account for the importance of different implicit assumptions and those who re-produce them. While state representatives are often posed as the most central actors in customary international law, a sole focus on this group neglects to analyse how silence is shaped (and only comes into existence) through the act of interpretation by other actors. International law scholars and practitioners (legal advisors, committee members, judges, scholars) can perhaps be understood as the most authoritative interpreters within the language game of customary international law through their professional status as experts (see for example Johnstone 2003, 450); yet, as I show in the next Chapter, some fundamental assumptions which determine the modality of the language game of customary international law, stem not from professional assumptions or legal principles, but from more dispersed discursive practices and differ within the same field.

This does not mean that all actors who participate in the language game of customary international law should be understood as equally powerful or that their professional context does not matter. The status of those who speak (or do not speak) affects whether they are heard by others, even at the inter-state level. Chapter III shows, for example, how silence in the case of ‘targeted killing’ can only be invoked by excluding a range of voices through different assumptions and methodological choices. Yet, the power relations within the language game of customary international law is at times perhaps less obvious than it would appear through more traditional theoretical frameworks. Chapter V, for example, demonstrates that a number of governments have explicitly framed their own silence on armed drone attacks as confirmation of existing international law principles through the modality of status quo. This does not mean, however, that their silence will be interpreted in this way by other actors.

Rather than focusing on the rules of the game as “patterns that constitute who we are and how we act in relation to specified others” (Fierke 2002, 338), I am interested in the political character of invoking silence in international law and the space for agency within the language game of customary international law. By agency I do not mean the free choice of individuals conceptualised as atomised actors independent of their overlapping social contexts, but rather draw on Emirbayer and Mische’s understanding of agency as “a temporally embedded process of social engagement” (Emirbayer and Mische 1998, 963). Analysing the different modalities within the confines of the language game of customary international law reveals lines of contestation regarding current ‘targeted killing’ debates which other approaches would miss and points to possibilities for re-appropriating the language game of

customary international law. Using silence as a lens for revealing those assumptions which are not dictated by professional standards thus has the aim to “render the contemporary situation intelligible in ways that might make it seem amenable to political action” (Orford 2012, 622).

Understanding the language game of customary international law as relatively autonomous, in the sense that it is not anchored to a particular locus or group of actors and their (assumed) interests and motivations, thus allows me to investigate the (sometimes counterintuitive) effects of re-producing the assumptions of a particular modality. It shows, for example, that a critique of state silence and a call for governments to speak on ‘targeted killing’ and to “oppose and ban the practice of extrajudicial targeted killings” (EU Parliament, Resolution 2567, 2014, para 2), risks reproducing ‘targeted killing’ as a legally relevant prompt. How to play customary international law at which forum is then a political question not only for state representatives, but also for NGOs, journalists, scholars and any individual who is writing, or refraining from writing, about a potentially developing un/lawfulness of ‘targeted killing’.

Moving away from a dichotomy between ‘legal’ and ‘political’, the question is then less about whether international law, as a set of principles, *becomes* instrumentalised by political actors and more about which political assumptions are reinforced by engaging in the language game of customary international law through one rather than another modality. It also moves away from the notorious question of whether international law principles are able to restrict the practices of powerful actors, towards understanding the invocation of international law principles (for example acquiescence) as *being* one of the practices – which is performed by powerful as well as less powerful actors for a

variety of purposes (see for a similar discussion regarding the use of Human Rights Perugini and Gordon 2015). This conceptualisation of silence as an analytical lens raises a number of methodological challenges, which the next section discusses.

2.3. Methods and Limitations

Unlike many sociolinguistic studies which focus on what Kurzon (2007, 1676) calls ‘conversational silence’ in face-to-face interactions, the silence of state representatives in international relations is located across several fora or sites at which silences appear about particular issues (such as ‘targeted killing’). These are what Kurzon (2007) calls ‘thematic silences’ and Huckin calls ‘textual silences’ about particular issues or “the omission of some piece of information that is pertinent to the topic at hand” (Huckin 2002, 348). In order to find these silences, Huckin’s methodological approach discerns silences by investigating foregrounded and backgrounded aspects within a larger body of relevant texts. This background strategy is close to the international law strategy of discerning the *residuum* in government statements – those issues which are left without objection across various cases (MacGibbon 1954, 119). After a brief overview of this approach, I explain in this section why and how my project uses a different methodological angle and the problems connected to that choice.

Most legal studies investigating a developing un/lawfulness of ‘targeted killing’ and similar measures, resolve to investigate a number of counterterrorism cases after 2001 which are seen as relevant (see for example Plaw and Reis 2016; Reinold 2011; Anderson 2009). Across

these cases the non-reactions are filtered out to understand which aspects states have tended not to protest against. These silences are then often seen to express acquiescence, indicating a general shift of *opinio juris* after 2001 which has demonstrated that “the international community seems to have become more tolerant of breaches of Article 2(4)’ (Garwood-Gowers 2011, 289). The synchronic cut for the “overall trend toward relaxing the restraints on military action” (Reinold 2011, 285) is usually perceived to have taken place in 2001 with the counterterrorism responses by a number of states (see for an overview of the cases often invoked De Hoogh 2016, 34). The cases normally examined include the 2002 intervention of Russia in Georgia in the pursuit of suspected terrorists (Trapp 2007; UN Doc S/2002/1012 2002); the 2003 Israeli attack in Syria and the 2006 Israeli attack in Lebanon (Plaw and Reis 2016, 239; Trapp 2007); the 2006 Ethiopian intervention in Somalia (Allo 2010, 165); the 2008 military attack by Colombia crossing the border to Ecuador to kill several FARC terrorist suspects (Corten 2010, 185; Reinold 2011); and the 2008 attack by Turkey against PKK members on the territory of Iraq (S. D. Murphy 2009, 35).

The very choice of these cases rests on the a priori assumption that they share a common denominator which constitutes a prompt of legal relevance even though the cases above differ quite significantly from each other and are embedded in complex, often decade-old historical contexts of cross-border violence (see for further discussion of this Antonopoulos 1996; Campana and Légaré 2010). Some of these interventions took place after significant armed attacks by non-state actors, such as in the case of Turkey where over 1500 people had been killed by terrorist attacks in the years prior to the intervention (Ruys

2008, 337) while others relied on the idea of more sporadic or imminent armed attacks, such as in the case of Ethiopia (Allo 2010, 154). The legal justification also differed, with the Turkish government not providing a clear legal basis or informing the Security Council (Ruys 2008, 345) and the Colombian government even apologising for the events (Organization of American States 2008).

While the methodology of choosing these cases could be questioned (De Hoogh 2016, 40), the main angle of my project is not about arguing that these cases are not relevant, nor that there has not been silence as a response to them. Instead, the main focus of this project is on *how* silence has been invoked in these cases; that is, the implicit assumptions the invocation of silence in these cases already rely on and the range of protest which is excluded in order to draw the line for communicative silence. My project thus engages with these cases not as empirical material in order to judge the un/lawfulness of ‘targeted killing’ but in order to investigate the assumptions of a particular modality of the language game of customary international law.

I thus, firstly examine what Schröter calls the “metadiscourse about silence” (2013, 48). Empirically, this means that silence can be directly encountered in documents when it is talked and written about in metadiscourses, such as court cases, treaty law and International law scholarship. I engage with these metadiscourses on silence by problematizing the epistemological questions, which invocations of silence raise. Given the complicated network in which government statements appear, disappear and persist on state websites, domestic media outlets, international media coverage, search engines, archives, scholarly literature, etc. how can you prove an absence of statements by any one government, let alone by a number of them? In complex

discourses across several language games, silence cannot easily be substantiated. While I can know of certain statements and utterances and can evidence them, there are always statements and utterances which I do not know of. And since I cannot know the utterances which I do not know of, this becomes a fundamental epistemological problem regarding the existence and proof for silence, the very knowledgeability of silence.

In larger discourses, such as the discursive plane at which government statements are made and recorded, direct experiences of silence thus disintegrate. Similar to the self-referentiality which Lianne Boer has analysed in consensus claims of legal scholarship, which is invoked rather than attested (Boer 2016, 1033), silence can be made up and construed, because no reference is expected. An interesting instance of such construed silence is a 2001 article by Kendall, who argues that states have been silent on the assassination of Abu Jihad in 1988. From this silence he infers acceptance: “The failure of states to condemn the assassination of Abu Jihad in 1988 provides further evidence of states’ unwillingness to broaden the concept, perhaps because they felt they would take the same sort of action” (Kendall 2001, 1076). Yet, what Kendall does not mention, is that this assassination had actually triggered quite a lot of protest, including a Security Council condemnation (UN Doc S/RES/611). Knowing of this condemnation I can challenge the presumed “failure of states to condemn” (Kendall 2001, 1076) quoted above, but the burden of proof is on me, precisely because silence cannot be evidenced.

When analysing silence, we can thus draw an analytical difference between logical and phenomenological silence. Logically silence can be understood to exist whenever I do not speak, whether it is in my room

by myself, in the supermarket queue or at a dinner party. Phenomenologically, silence can be seen to exist when it is perceived by someone else (Schröter 2013, 24). Logically, silence exists every time an issue is not talked about, phenomenologically, when silence is noted. Logical and phenomenological silence are not always congruent and in the case of complex discourses, logical silence (whether actors actually have been silent on a particular issue) can become impossible to prove. These silences can have a phenomenological existence, however, and it is this phenomenological existence which is the entry point for my critique of current debates on the un/lawfulness of ‘targeted killing’.

Secondly, my empirical material entails an investigation of the UN database for key words around ‘targeted killing’ and armed drone attacks. I have thus conducted a wide empirical investigation of over 900 Security Council debates from January 2000 to December 2016 in which armed drone attacks and other ‘targeted killing’ uses of force might have been discussed. I examined Security Council debates regarding the use of force, such as ‘threats to international peace and security’, ‘protection of civilians in armed conflicts’, ‘prevention of armed conflicts’, ‘high-level meeting: combating terrorism’, ‘maintenance of international peace and security’, ‘the promotion and strengthening of the rule of law in the maintenance of international peace and security’. I also investigated debates referring to the countries and regions within which ‘targeted killing’ claims have been used to justify violence (see for an overview UN Doc A/HRC/14/24/Add.6 2010b), including ‘the situation in the Middle East’, ‘the situation in Somalia’, ‘the Situation in Afghanistan’, ‘peace and security — terrorist acts: Pakistan’, ‘Middle East situation – Syria’, ‘the situation in Georgia’. I did not include debates in this examination which referred to issue

areas or regions less related to ‘targeted killing’ claims, such as ‘the situation in Timor-Leste’ or ‘election of a member of the International Court of Justice’. My search returned 975 Security Council debates, each of which I examined for the following key words: ‘targeted’; ‘assassination’; ‘execution’; ‘extrajudicial’; ‘drone’; ‘unmanned’; and ‘remote’.

One of the problems of the above selection is the time frame of 2000 – 2016, which risks reifying the claim that state practice has fundamentally changed after 2001. Situating the concept ‘targeted killing’ within a wider historical context of colonial and post-colonial use of force, Chapter IV thus examines the use of similar concepts (such as assassination in self-defence) before 2000. I consequently investigate Security Council debates on similar counterterrorism practices by the US and Israeli government during the 1980s and 1990s. I also trace the colonial legacy of ‘targeted killing’ through its conceptual similarities with representations of ‘police bombing’ by European powers in former mandates and colonies in the 1920s and 1930s.

In order not to exclusively focus on the Security Council, I furthermore included a wider search of the keywords around ‘targeted killing’ at the United Nations Yearbook as well as the United Nations General Assembly database and thus analysed debates of armed drone attacks at the Human Rights Council. While a number of statements advanced outside of the forum of the UN are examined in the following Chapters, it was not within the scope of this dissertation to conduct a comprehensive investigation of acts of protest outside of the UN. This is relevant regarding the question of silence. Even if a government has not raised objections to the US practice of armed drone attacks at the UN, they might have condemned them publicly in other statements,

such as Sweden in a public objection to US armed drone attacks in 2002 (Anderson 2009, 15). If this objection had not been cited by Anderson, it would be difficult to know about its existence. Silence outside of a particularly delimited set of sources (such as a set of Security Council debates in a particular time frame screened for particular key words) is impossible to evidence. This raises more fundamental questions regarding the methodological difficulty of evidencing non-objections and the epistemological problems of silence.

The epistemological challenge of silence, is at the same time an opportunity to problematize the positivist assumptions within much of traditional international law scholarship and expertise. This is important, because silences and interpretation of silences are so closely linked to power asymmetries. I can, for example, not give any proof that the government of Sierra Leone has been silent on US armed drone attacks. I might more reasonably be able to assume that European states have been silent because there has been literature on this silence (see for example Dworkin 2013; ICCT 2016; Van Raemdonck 2012) and because evidence to the contrary (i.e. formal condemnation by a European government) would presumably be covered by Western media. But in the case of non-Western states, I do not know whether governments have not voiced formal objections which were perhaps covered by an outlet and in a language I do not have access to. Because of this, an analysis of silence raises questions that go to the heart of the power-knowledge nexus in international law. It raises questions about not only who can speak but about whose objections are heard, which objections and silences are recorded and which outlets are read. It thus draws attention to what critical scholars have often emphasised; the need to reflect on the power asymmetries within scholarship itself.

An important area for further research the dissertation has hence brought up, relates to how players of the language game of customary international law are situated. A more sociological analysis is beyond the scope of this dissertation but the final conclusion will suggest some ways for further research to build on the analytical framework of this dissertation in order to investigate how actors are situated regarding their social and professional context and the time period they write in – how they are “embodied/embedded people with resources and ‘habitus’” (Leander 2011, 298). The different modalities of the language game of customary international law should thus be examined in relation to groups of actors (for example regarding their professional and educational background). Particularly because, as this dissertation argues, the non-state participants of the language game play a crucial role in the re-production of assumptions and discursive facts, a more sociological analysis of the dynamics within a specific field or sub-field would be important, for example to investigate the symbolic value of the invocation of the controversial term ‘targeted killing’ within scholarship in international law and international politics.

This includes the use of the concept ‘targeted killing’ within this dissertation itself. As Chapter IV demonstrates, the use of the concept is problematic for authors critical of the potentially developing lawfulness of ‘targeted killing’ since the legal discussion of ‘targeted killing’ contributes to constitute it as a legally relevant category (Krasmann 2012). Similar to the normative dilemma of critical security scholars who use the concept security “when the security knowledge risks the production of what one tries to avoid, what one criticizes” (Huysmans 2002, 43), the use of the term ‘targeted killing’ is not innocent. This dissertation uses the term ‘targeted killing’ in inverted

commas and examines the contingency of its discursive roles and the powerful effects of *not* invoking and discussing the concept. I am aware, however, that this does not entirely solve the dilemma.

2. 4. Conclusion

This Chapter has advanced an analytical framework to examine customary international law as a language game through the lens of silence. I thus investigated (a) *how* it is possible for silence to gain communicative functions and (b) what silence can *do* – the different ways in which it can work. Building on sociolinguistic studies of silence, the Chapter proposed four parameters to trace how the line between communicative silence and silence as exclusion is drawn: The perception of a prompt, the perceived deliberateness of silence, the expectation of speech and the assumption of relevance. The following Chapters will draw on these parameters in order to investigate how it is possible for silence to be mobilised in recent ‘targeted killing’ debates and how this relates to forms of silencing and exclusion which might be indicative of international law more generally. Chapter III shows, for example, how silence has been invoked, while excluding protest at particular fora where speech is not expected or not considered relevant, or by particular actors, such as the Non Aligned Movement.

Far from just being a form of exclusion, this Chapter showed how silence can have important communicative functions in inter-state relations beyond acquiescence, for example as disregard to a claim, or as a diplomatic stance in order to avoid open conflict. Drawing on

Wittgenstein, the Chapter conceptualised customary international law as a type of language game within which silence can have different communicative roles. Each of them relies on different sets of implicit assumptions, on different modalities of the language game of customary international law: In the modality of evidence silence works as potential acquiescence; in the modality of status quo silence functions to disregard a prompt; and in the modality of context silence works to keep the question of legality open. Not focusing on the rules of the language game of customary international law per se, my focus is rather on how within the restrictions of legal principles and professional norms, customary international law can and has been engaged with *differently*.

The communicative functions of silence thus draw attention to forms of agency and lines of contestation already at work within the language game of customary international law, which would be missed if customary international law was analysed more one-dimensionally. Chapter V shows, for example, how various governments have used silence on armed drone attacks as confirmation of the status quo, arguing that there is no need to discuss ‘targeted killing’ because existing legal frameworks are sufficient to regulate the new drone technology. The following Chapters engage with customary international law as a language game in order to reveal precisely those assumptions in the case of ‘targeted killing’ debates which are often taken for granted. Chapter IV thus problematizes how practices such as armed drone attacks have been delineated through the new concept ‘targeted killing’ as a legally relevant prompt which calls for a reaction – despite historical continuities with similar counterterrorism claims and practices.

Theorising customary international law as a language game then allows to conceptualise the role of actors who are often understood to observe

state acts from the outside (e.g. scholars, journalists, courts, policy makers). Investigating *how* silence can operate as potential evidence (i.e. the implicit assumptions necessary for silence to work as acquiescence), the next Chapter thus challenges a positivist approach to silence as an objectively given fact. It shows that through different speech expectations and assumptions of relevance, silences will not only be interpreted differently (e.g. as ignoring an issue) but are not noted at all. Showing the silencing dynamics of this process, the next Chapter thus demonstrates how customary international law is not just about the passage of how facts are turned into law, but how something (like silence) is turned into a discursive fact in the first place.

“What we require is
silence ; but what silence requires
is that I go on talking .”⁷

⁷ John Cage ‘Lecture on Nothing’, printed in Cage (1959) *Silence*, p. 109

Chapter III

Creating Law From Absence

The previous Chapter theorised customary international law as a type of language game, in which different modalities are at work. I developed a framework for using silence as an analytical lens in order to unpack the role of taken-for-granted assumptions which determine how the language game is played. Silence lends itself as an analytical tool, not only because acquiescence is so fundamental for customary international law, but because the function of silence depends on what is listened to and how this listening takes place. Building on sociolinguistic and discursive studies, the previous Chapter developed four parameters for analysing communicative silence: The presence of a prompt, the perceived deliberateness of silence, the expectation of speech and the assumption of relevance.

This Chapter examines the assumptions which are necessary for silence to work as acquiescence. Building on my empirical investigation of government statements and silences around ‘targeted killing’ and armed drone attacks at the UN, I examine how silences are always situated within a political context which determines who can speak, where, how,

about what – and what is listened to. Invoking silence as a given fact ignores this political context and the exclusions which are productive of silence. Unpacking the silencing dynamics underlying the invocation of silence as tacit consent, the Chapter thus argues that the application of seemingly objective criteria to the interpretation of silence as acquiescence often ends up masking the “brutality of the passage of fact into law” (Stern 2000, 93).

The Chapter proceeds in four parts. The first part traces silences on armed drone attacks and similar practices and claims in order to illustrate how they appear as acquiescence to ‘targeted killing’. Examining how silence is conceptualised as absence of protest, I present the modality of evidence, within which silence is approached as potential acquiescence. The second part shows how this conceptualisation of silence as acquiescence attempts to anchor the legal quality of silence within the materiality of the prompt (the state practice). This cannot escape the political nature of the act of interpretation however. Discussing the criteria for “legally qualified silence” (Villiger 1985, 7:39), I show how silence in the case of armed drone attacks thus becomes fundamentally dependent on how the prompt is understood by those who invoke silence, while it neglects to reflect on the political context through which silence is produced.

The third part examines the postcolonial legacy of the acquiescence doctrine in order to shed light on some fundamental silencing dynamics at play when silence is invoked in the case of ‘targeted killing’ claims and practices – not just in the sense of who can/not speak, but also in the sense of what is (not) listened to. Drawing on my empirical analysis of over 900 Security Council debates, I show, for example, that while there seems to be a lack of direct protest against US practices at the

Security Council, Israeli ‘targeted killing’ claims have been unanimously condemned by almost all states over various Security Council debates. Ignoring the political context of particular silences then not only masks the silencing dynamics at the inter-state level, but also fails to reflect on the assumptions underlying the act of invoking and interpreting silence in the first place. The fourth part, consequently, shows how expectations and assumptions of interpreters influence not only the interpretation, but the discursive existence of silence.

3.1. Silence as Acquiescence

Customary international law develops from consistent state practice and a subjective element of *opinio juris*, which means the interpretation that a majority of governments is following a legal obligation (Villiger 1985, 7:17; Byers 1999, 142). Unlike the explicit consent to and written “thereness” (Kammerhofer 2004, 524) of treaty law, customary international law is based on the interpretation of state acts – and non-acts. The identification of customary international law thus often works through the modality of evidence, within which the silence of governments is already approached as a question of evidence, of whether “the absence of international comment or criticism (...) be interpreted as tacit endorsement”(Garwood-Gowers 2011, 265). This section introduces the modality of evidence, in which silence is conflated with absence of protest, and shows how silence on armed drone attacks can thus be construed and mobilised as acquiescence.

3.1.1. Droning Silence

In 2014, the EU Parliament passed a resolution on the ‘Use of Armed Drones’ which “calls on the High Representative for Foreign Affairs and Security Policy, the Member States and the Council to (a) oppose and ban the practice of extrajudicial targeted killings; (b) ensure that the Member States, in conformity with their legal obligations, do not perpetrate unlawful targeted killings or facilitate such killings by other states” (EU Parliament, Resolution 2567, 2014, para 2). In this resolution, the EU Parliament calls on the EU Council to speak up and “urges the Council to adopt an EU common position on the use of armed drones” (EU Parliament, Resolution 2567, 2014, para 3). Neither the Council nor individual member states, however, appear to have responded (ICCT 2016).

At the Security Council, there similarly seems to be a reluctance to address the issues which the EU Parliament argues that armed drone attacks have raised. Having investigated over 900 Security Council debates from 2000 to 2016, I found 21 statements by government representatives on armed drone attacks (searched through the terms ‘Drones’, ‘Unmanned’ and ‘Remote’). Most of these statements are advanced in the context of Security Council debates on civilians in armed conflict. They tend to discuss armed drone attacks regarding adherence to International Humanitarian Law and International Human Rights Law. Thus, for example, the representative of Austria who “supported the Secretary-General’s call to ensure that attacks by armed drones complied fully with international humanitarian law and human rights laws” (UN Doc S/PV. 7109), the call of the Russian representative “for careful investigations of the killing and wounding of

children due to drones” (UN Doc S/PV.6980), and the statement of the representative of Guatemala who was “concerned with civilian casualties caused by modern technologies such as unmanned airplanes” (UN Doc S/PV. 6917).

Some of these statements are critical of armed drone attacks, such as the South African representative who refers to “the use of unmanned aerial assets against targets which inevitably led to the killing of innocent civilians” (UN Doc S/PV. 6790). Yet, most of these statements remain at a general level and refer to the ways in which armed drone attacks might violate IHL requirements, not to any actual practices or claims, such as US ‘targeted killing’ claims. Only three speakers referred more specifically to US practices; the Pakistani representative who said that “the use of armed drones violated sovereignty, caused civilian casualties, and put communities at risk of reprisal attacks” (UN Doc S/PV. 6980) and “was of the view that the use of armed drones had been counterproductive, having killed hundreds in his country alone” (UN Doc S/PV. 7109); the UN High Commissioner for Human Rights who argued that he was “seriously concerned at the deaths resulting from counter-terrorism activities in Yemen, Pakistan and Somalia, as well as the lack of transparency around the circumstances in which armed drones were used” (UN Doc S/PV. 6790); and the representative of Venezuela who asked “Why was civilian protection not invoked when American drones killed dozens of civilians in Afghanistan, Yemen and Pakistan?” (UN Doc S/PV. 6790). It is noticeable that when armed drone attacks are discussed at the Security Council, they tend to be addressed in terms of general compliance with the laws of war and Human Rights standards with few statements directly addressing US practices.

The apparent silence on US ‘targeted killing’ claims and practices, such as armed drone attacks, has been invoked by some interpreters as evidence for tacit consent to a re-interpretation of the right to self-defence because it shows that “most other states seem to be willing to acquiesce in this reinterpretation of the customary law of self-defense” (Plaw and Reis 2016, 246; see also Anderson 2009). The discussion of silence on armed drone attacks and similar Israeli and US practices and claims is often linked to a wider chain of cases and a more general shift of *opinio juris* after 2001 (see for example Tams 2009, 379–80; Reinold 2011). Building on a number of famous post 2001 cases of counterterrorism use of force to which states are seen to not have objected, this evidences that “the international community seems to have become more tolerant of breaches of Article 2(4)” (Garwood-Gowers 2011, 289). The cases often examined include the 2002 intervention of Russia in Georgia in the pursuit of suspected terrorists (UN Doc S/2002/1012) to which other actors did not respond and “no Security Council action has been taken on the matter” (Trapp 2007, 153); the 2003 Israeli attack in Syria (UN Doc S/PV. 4836) and the 2006 Israeli attack in Lebanon (UN Doc S/PV.5493) on which none of the state delegations in the Security Council articulate the (un)lawfulness of this kind of use of force in principal (Trapp 2007, 153; Tams 2009); the 2006 Ethiopian intervention in Somalia (UN Doc S/PV.5614) which met with “attendant silence of the Security Council” (Allo 2010, 165); the 2008 military attack by Colombia crossing the border to Ecuador to kill several FARC terrorist suspects (Corten 2010, 185) which “failed to elicit much of a response from states and international organisations outside of Latin America” (Reinold 2011, 273); and the 2008 attack by Turkey against PKK members on the territory of Iraq which was not

brought to the attention of the Security Council and which neither General Assembly nor the ICJ discussed (S. D. Murphy 2009, 35).

Linked together these cases seem to indicate a general silence, a systematic lack of state objections to ‘targeted’ counterterrorism uses of military violence after 2001. It seems to show that “the dominant trend in contemporary interstate relations seems to favor the view that States accept or at least tolerate acts of self-defense against a non-State actor” (S. D. Murphy 2009, 126). This broad understanding of acquiescence to a more extensive right to self-defence against non-state actors has been used in order to justify armed drone attacks and to evidence that the customary interpretation of the right to self-defence has shifted towards acceptance of ‘targeted killing’ attacks against non-state actors on foreign territory: “In other words, it is important not to see the US on this point as some solitary outlier from other states” (Anderson 2009, 21). Investigating the legality of ‘targeted killing’, Downes, for example, voices concerns over the silence of states which indicates increasing acceptance for such practices (Downes 2004, 292) and Murphy legally justifies US drone attacks by referring to similar state practices which have not prompted any objection by other states (S. D. Murphy 2009, 34).

Thinking within the modality of evidence, it is difficult to escape this logic. Silence seems to almost speak for itself, as a lack of objection and tacit endorsement of such practices. Yet, as the previous Chapter showed, silence can only be understood to speak based on a particular understanding and representation of the discursive context, a particular take on what is listened to and how this listening takes place. The rest of this Chapter hence seeks to gradually complicate and challenge the

logic of this silence as a fact which is conflated with absence of protest. After a brief overview of the acquiescence doctrine and the speech expectations it purports, I discuss silence on armed drone attacks according to the requirements for acquiescence and show how silence can only be grasped as absence of protest in relation to a preconceived prompt.

3. 1. 2. Protest and Lack of Protest

The question of silence as acquiescence is not new in customary international law. In 1927, the Permanent Court of International Justice refers already to a lack of objection in the *Lotus* case, deducing consent to the practice from the silence of the French government: “It seems hardly probable, that the French Government (...) would have omitted to protest (...) if they had really thought this was a violation of international law.” (PCIL 1927, 79) Even a practice which is breaking existing laws may over time become legal, if other states fail to effectively protest against this practice. Silence thus works as acquiescence through its connection with a practice which prompts no protest. The ICJ affirms this in the 1951 *Fisheries* case, where the Norwegian system was judged as customarily lawful, because Great Britain did not protest against the system and the “general toleration of the international community” led to a binding law (ICJ 1951, 139).

Customary international law is still important today and there has been a resurged interest in the processes of customary international law formation, as evidenced, for example, in recent inquiries of the International Law Commission (UN Doc A/CN.4/682 2015; UN Doc A/CN.4/L.872 2016; see also B. S. Chimni 2018). Even though there

has been a proliferation of treaties in previous decades, customary international law is still fundamental, at least partly because it does not depend on explicit consent (Bradley and Gulati 2010, 209). Particularly for contested legal areas, customary international law has the advantage that it can be formed without requiring the signature of state representatives, instead relying on the interpretation of practices, statements, objections to practices – and the lack of objection. This is linked to the two “constituent elements” (UN Doc A/CN.4/682 2015, 12) of customary international law as defined by the ICJ Statute as “general practice accepted as law” (International Court of Justice 1945 Statute, para 38).

Silence thus works as consent through the disappointed expectation of speech, through being an absence of protest when “the conduct of the other State calls for a response” (International Court of Justice 2008 para 121). The importance of protest in customary international law can be illustrated with the so-called persistent objector rule. If one state or a minority of states protest against a practice, they are not bound by the customary law which might develop from this practice (Mendelson 1996, 193). Protest is thus regarded important as a strategic move for state representatives, a “defence mechanism” (MacGibbon 1954, 171) against potentially developing customary laws which are not in the interest of the protesting state. It is against this importance of objections, that silence is framed as acquiescence: “The very plethora of notes of protest (...) serves to characterize as noteworthy a failure to utilize this adaptable instrument in situations where its use would normally be expected” (MacGibbon 1954, 171).

It has been argued that this importance of protest – and lack of protest – in the process of customary international law formation has further

increased with growing communication technologies today and increased information on foreign acts (Wolfke 1993, 8; the International Law Commission supports this perspective UN Doc A/CN.4/682 2015, 13). As has been argued in the context of the Turkish intervention in Iraq: “This silence [at the Security Council] is surprising given the scale of the incursion and the wide-ranging opportunities that states now enjoy to expressing their opinion on the behaviour of other states” (Van Steenberghe 2010, 194). Certainly within scholarship and other legal contributions to the language game of customary international law, protest and lack of protest are regarded extremely significant, which is why official communications of governments are focused on when judging the developing lawfulness of certain practices and claims. The exact words and phrases of government statements are scrutinized and used as evidence in debates about the developing un/lawfulness of certain practices (see for example Trapp 2007).

Yet, it could also be argued that precisely because every word of state representatives is scrutinized and interpreted by scholars and other actors, states are particularly cautious about what they say (Johnstone 2003). It can be risky (particularly in steep power asymmetries), or counterproductive to officially protest against a state practice. Protest might lead to “argumentative self-entrapment” (Risse 2000, 32) and might have unforeseen consequences. As a US diplomat has put it: “The possibility that a legal argument may get turned against you elsewhere causes you to shut up” (Interview, quoted in Johnstone 2003, 468). As discussed in the previous Chapter, silence can work to leave questions of legality open, it can be a diplomatic move or even a way to prevent an issue from becoming legally relevant.

Within the modality of evidence, however, silence is already framed as absence of protest. It works as acquiescence through a high expectation for state representatives to be vigilant and to protest against a practice which is understood to infringe the rights of that state. If there is silence, this is approached through its (potential) function as tacit consent: “The argument sometimes raised that the omission of any protest may be due to a reason other than the tacit acceptance of the practice is unconvincing. Whatever the reason for such an omission, nowadays a State does this at its own risk” (Wolfke 1993, 9; MacGibbon 1954, 181). Dependent on a number of requirements, silence is thus understood to constitute acquiescence. The next section unpacks these criteria for acquiescence regarding the case of silence on US armed drone attacks and shows how the conceptualisation of silence as absence of protest within the modality of evidence hinges fundamentally on the perceived nature of the prompt.

3.2. Legally Un/Qualified Silence

In the third report on the identification of customary international law, the International law Commission (ILC) emphasized that only some instances of state silence can be interpreted as acquiescence (UN Doc A/CN.4/682 2015, para 23). This section engages with the requirements for silence as acquiescence advanced in the third report by the ILC, in international court cases and in scholarship. I apply the requirements for acquiescence to the silence on US armed drone attacks in order to illustrate that (a) the criteria for acquiescence tend to focus on the nature of the prompt and anchor the legal quality of silence into the seemingly objective nature of the prompt as the “raw material for

custom” (Wolfke 1993, 4); that (b) silence as acquiescence (for example in the case of armed drone attacks) thus fundamentally depends on how the state practice is grasped by legal interpreters; and that (c) the modality of evidence hence tends to neglect both the question of the ability to speak in an asymmetrical political context and the assumptions and expectations of the interpreters through which silence is noted in the first place.

What is established as the most important factor for silence to function as acquiescence, is that the state practice “calls” for a reaction (UN Doc A/CN.4/682 2015 para 21). As the ICJ argues in *Malaysia/Singapore*: “[t]he absence of reaction may well amount to acquiescence (...) [t]hat is to say, silence may also speak, but only if the conduct of the other State calls for a response” (International Court of Justice 2008). Whether or not silence can be interpreted as acquiescence thus depends on whether the state practice (i) is seen as public and openly known, (ii) demonstrates legal commitment and advances a general, legal claim, (iii) is regarded to be consistent and lasting for a sufficient length of time and (iv) is seen to affect the interests of the silent states. The following part discusses these conditions for acquiescence in the case of silence on US armed drone attacks.

In order to prompt acquiescence, a state practice has to (i) be “open and public” (International Arbitral Awards 1928) and made known in a way in which other States would have, or ought to have, knowledge of it (International Court of Justice 1951). The requirement for the acts to be public links into the importance of actual or constructive knowledge of the practice by the silent states whose non-objection can – so the assumption – thus be interpreted as a deliberate stance. This means that documents or actions demonstrate that the silent states had actual

knowledge of the practice: “(...) a State whose inaction is sought to be relied upon in identifying whether a rule of customary international law has emerged must have had actual knowledge of the practice or the circumstances must have been such that the State concerned is deemed to have had such knowledge.” (UN Doc A/CN.4/682 2015, para 24) The state acts have to be “public, formal acts” which “invite[] opposition (...) if [the acts] were believed to be unwarranted” as the Arbitral Awards argued in *Honduras border* (Reports of International Arbitral Awards 1933).

Applying this requirement to the silence on US armed drone attacks shows the difficulties for determining whether a practice is seen to “call for a response” (International Court of Justice 2008). The US government has officially justified armed drone attacks and it can be assumed that all governments around the world have knowledge of the attacks; yet actual ‘targeted killing’ practices and procedures through the CIA drone program have been shrouded in secrecy (Birdsall 2018, 3). While the US government has claimed that ‘targeted killing’ outside of traditional armed conflicts is lawful in principle, the way in which killings take place is explicitly not disclosed (Harold Koh, Department Of State 2010). Individual drone attacks are usually not publicly admitted when they happen and are instead revealed through contradictory reports by local officials and sporadic media coverage, such as the following: “US Central Command (...) denied conducting Thursday’s strike while the CIA refused to comment when contacted by the Bureau, a position it has routinely taken” (Bureau of Investigative Journalism, 6th of March 2017). While the practice could thus be framed as an open practice which all states have knowledge of, the secrecy could also be seen to limit the legal grounds on the basis of which

governments around the world could object to the state practice. As the research paper by the International Centre for Counter-Terrorism put it, the silence of EU member states on drone attacks might be due to a lack of precise knowledge of any specific attacks (ICCT 2016).

Regularity of acting cannot in itself form the basis for a new law. As the International Court of Justice argues: “The frequency, or even habitual character of the acts is not in itself enough.” (International Court of Justice 1969, para 77). A practice requires certain legal characteristics in order to serve as a prompt for acquiescence because “acting or agreeing to act in a certain way, does not in itself demonstrate anything of a juridical nature” (International Court of Justice 1969, para 76). It is difficult to point to what exactly constitutes the “juridical nature” (International Court of Justice 1969, para 76) and the last section will discuss the assumptions of legal relevance within the invocation of silence by interpreters themselves. Within traditional approaches to customary international law, the practice seems to be required to itself (ii) demonstrate legal commitment and enact generalized claims as opposed to an irregular practice out of political convenience (UN Doc A/CN.4/682 2015; MacGibbon 1957).

It depends on the view of the interpreter whether US armed drone attacks are seen to demonstrate legal commitment rather than political convenience. On the one hand, the US government has justified ‘targeted killing’ as a general category of lawful state conduct in various public justifications by US administrative figures (Brennan 2012; Department of Justice 2013; Barack Obama 2013). On the other hand, the US government has given the impression that it does “not want to set precedents for other states” (Reinold 2011, 281). The use of force in ‘targeted killing’ attacks in Pakistan (where most ‘targeted killing’

attacks outside of traditional zones of armed conflict have taken place) has, for example, not been reported to the Security Council. This can be seen to undermine an interpretation of legal commitment since “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence” (International Court of Justice 1986 para 200), as the ICJ put it in the *Nicaragua* case.

In order to work as acquiescence, the state practice as well as the ensuing silence (iii) has to be continuous, consistent and lasting over a “sufficient period of time” (UN Doc A/CN.4/682 2015, para 25). There are no formalistic measurements of the time needed for silence to constitute acquiescence since this depends on various factors (MacGibbon 1954, 165). While arguments of ‘instant custom’ have been advanced by some legal scholars (Cheng 1965; Langille 2003a), in the *Fisheries* case, the ICJ emphasized the length of time where “for a period of more than sixty years the United Kingdom Government itself in no way contested [the Norwegian practice]” (International Court of Justice 1951, 116). The length of time is here directly related to the continuity and consistency of the corresponding state practice.

It is a matter of interpretation how continuous and consistent the legal claim of ‘targeted killing’ is seen to have been enacted and responded to since its inception (the first time the concept ‘targeted killing’ was officially endorsed by the Israeli government was in 2000 (UN Doc A/HRC/14/24/Add.6 2010a, B.13; see also Ben-Naftali and Michaeli 2003, 234)). As I will discuss in the next section, most states have objected to Israeli ‘targeted killing’ claims and practices while, however, reframing from addressing US practices at the Security Council. The US government itself voiced concerns about Israeli ‘targeted killing’

practices at the Security Council (UN Doc S/PV.4588). Regarding the continuity of the practice of US armed drone attacks, it is not clear how many of them advance ‘targeted killing’ claims. The vast majority of armed drone attacks in Pakistan, Yemen and Somalia seem to actually have taken place within traditional, non-international armed conflicts with consent of the territorial state (Brookman-Byrne 2017).

For silence to be regarded as acquiescence, it is important (iv) for the act to be seen to affect the interests or rights of the silent states (UN Doc A/CN.4/682 2015 para 23). What exactly that means depends on the interpretation of what the rights and interests of the silent states are considered to be. It has been suggested that there are “areas of relations affecting the common interests of all mankind” in which absence of protest always implies acquiescence (Danilenko 1993, 108; UN Doc A/CN.4/682 2015) and it could be argued that the use of force constitutes such an area of common interest. On the other hand, current counterterrorism practices in places such as the marginalized FATA region in Pakistan might not affect the interests of most governments and they might in fact have strong interests to refrain from protesting against US practices.

As this discussion of the requirements for acquiescence in the case of US armed drone attacks shows, almost all of the criteria for acquiescence are focused on the nature of the prompt. The preoccupation with the prompt within the modality of evidence can be seen as an attempt of anchoring silence into a materiality of ‘facts’ which resonates with the project of constituting international law as objective, technical knowledge (Koskenniemi 2007). The above analysis indicates, however, that the question whether these acts are understood as a practice which “calls for a response” (International Court of Justice

2008) is not as self-evident as it is assumed when silence is invoked as acquiescence to the preconceived prompt.

The preoccupation with the prompt within the modality of evidence is problematic, not only because it purports objectivity of interpretation, but also because it largely ignores the role of the context and the question of who can speak and what is listened to in the first place. The question of the deliberateness of silence is hence often not explicitly discussed at all. Deliberateness is either presupposed because states are sovereign actors; or it is seen as irrelevant because importance is not placed on the intentionality but on the *function* of silence in the legal system. Precisely because treaty negotiation can be expensive, time consuming and at times not feasible between certain governments, the international legal order could, from this perspective, not function if explicit consent was required for every rule and "the objectification of silence should be viewed in this broader context of preserving normative effectivity" (Starski 2017, 30; see similarly MacGibbon 1954, 184). Not disputing the significance of the function of silence in customary international law, the next section examines the silencing dynamics which are masked through "the objectification of silence" (Starski 2017, 30), thus risking to participate in existing power asymmetries.

3.3. The Subaltern Cannot Speak

Silence gains its legitimacy as tacit consent through the assumption of a certain symmetry in inter-state relations, through the presumption of a "juridical equality, which may not accord with the actual inequality of

states in international relations” (Tunkin 1961, 427). Non-Western international law experts have, not surprisingly, tended to stick to a voluntarist notion of requiring explicit consent for the identification of customary international law, rather than acquiescence (Bradley and Gulati 2010, 228; see also B. S. Chimni 2018, 11). From a post-colonial perspective, the assumption of state equality in the acquiescence doctrine works to the detriment of those who are presumed to be able to speak while they cannot actually do so (Stern 2000, 93; Anghie 1999, 40). This section reflects on the postcolonial legacy of the acquiescence doctrine, in order to shed light on some fundamental silencing dynamics at play in the case of silence on armed drone attacks.

Third World Approaches to International law have showed how the idea of the sovereign state as the law-creators in customary international law is historically situated in the turn towards positivism in the 19th century. Within the older, natural law approach, it was not important to define the proper subjects which could create international law, because all human activity was seen to be governed by a transcendental (often Christian) understanding of morality, including practices of nomadic tribes and settled non-European societies (Anghie 1999). With the turn towards positivism, new criteria were found in order to distinguish between those who were full members of the international society and could thus influence customary international law or make treaties, and those who were found lacking state sovereignty and thus excluded from law-creation.

The exclusion of non-European entities, was in turn used to legitimise acquisition, sometimes in hindsight. In the justification of colonial violence, such as for the acquisition of *terra nullius* (land which was considered ownerless), acquiescence thus played an important role.

Protest required sovereign statehood and excluded non-European voices from speaking in a legally meaningful way: “To be effective, from a legal point of view, the protest must be directed against the violation of a right which is vested in the protesting State. Where territory is ownerless, no State has a right in relation to the territory which would be infringed by its occupation by another State: hence there would exist no legal basis for protest” (MacGibbon 1954, 167; Anghie 1999, 3). In a circular move, this non-objection then served to legitimate the acquisition since it confirmed “the likelihood that the territory was *terra nullius* at the critical date” (MacGibbon 1954, 168).

The acquiescence doctrine in customary international law has thus from its inception been closely linked to practices of exclusion. Particularly with the accession of non-Western states as new members of the international law system in the 20th century, the acquiescence doctrine can be seen as an important tool in customary international law for imposing standards onto non-Western states which now formed the majority of the inter-state system (Bradley and Gulati 2010, 230). In order to mitigate the primacy of sovereign states as the law-givers which can only be bound by what they agreed to (Anghie 1999, 2), customary international law was based on the *presumption* of consent – “a presumption founded on the silence of the minority state which has not protested and on the silence of the new state at the moment of its accession to independence” (Stern 2000, 98).

The postcolonial legacy of acquiescence points to some structural ways in which Third World States might be excluded and silenced within the language game of customary international law today. Smaller, less powerful states have for example been showed to be less able to speak in international organisations (Panke 2017). Many economically

disadvantaged states even lack the bureaucratic resources to monitor practices, analyse their legal implications and publish their own practices and positions (Kelly 1999, 474). Acts and statements by non-Western governments are furthermore often not considered or even registered. In a predominantly Anglophone field in which acts and statements are often accessed by relying on their coverage in dominant, Western outlets, sources not available in English or acts covered in regional publications or media reports are often excluded from consideration (Kelly 1999). Olivier Corten thus points to the legal debates on the invasion of Yugoslavia in which practices by NATO states were emphasised while “the reticence and protest of other [non-NATO] states (such as members of the non-aligned movement), on the other hand, were minimized; ignored, even” (Corten 2005, 811). This is why “the historic centrality of western state practice in the formation of rules of customary international law continues” (B. S. Chimni 2018, 21).

In order to understand the silence on US ‘targeted killing’ practices, the post-colonial context of the claims and practices thus needs to be considered; not only because most ‘targeted killing’ practices take place in former colonies (see for example Satia 2014) but also because Third World states are often dependent on government agencies using violence and have less political freedom to speak up against practices by powerful state agencies (Brunnée and Toope 2010, 74) – even if their objections were to be heard. Governments in whose territory, the interventions take place “are almost never in a position to credibly challenge states that use force in their territory illegally” (Ahmed 2013, 18). This is important because without protest by the attacked states, it is difficult for other states to protest against the attack (Corten 2016, 788). Most governments in the Global North, as well as certain military

elites in the targeted states themselves, are furthermore tied to US foreign policy practices and their secret services are often deeply involved through a tight network of surveillance services, a transnational "targeting regime" (Zappala 2015, 254).

Silence on US practices and claims is thus also linked to the hegemonic position of the US itself. My empirical investigation of Security Council debates further underlines this, because the reluctance to oppose US 'targeted killing' claims and practices at the Security Council is juxtaposed by the vehement protest Israeli 'targeted killing' practices and claims have received. Having screened over 900 Security Council debates between 2000 and 2016, I have found that almost all states have clearly rejected Israeli 'targeted killing' claims and practices over various Security Council debates. The representative of China has stated that "the practice of targeted removal by Israel violates international law and is therefore unacceptable" (UN Doc S/PV.4929), the Russian delegation states that "on numerous occasions Russia has declared its rejection of extrajudicial execution and targeted elimination" (UN Doc S/PV.4945), the French representative found that "France has always condemned the principle of any extrajudicial execution as contrary to international law" (UN Doc S/PV.4929), the representative of Chile stated that "extrajudicial executions are reprehensible acts that not only violate international law but also hamper reconciliation" (UN Doc S/PV. 4945), the United Kingdom "has consistently condemned extrajudicial killings" (UN Doc S/PV.4934) and even the United States "is concerned about some Israeli tactics and actions, including targeted killings and actions that endanger innocent civilians" (UN Doc S/PV.4588).

I counted objections to Israeli 'targeted killing' claims and practices in statements by 63 different state delegations, not taking into consideration those states who are represented by supranational organisations. The EU has thus unanimously condemned a number of Israeli 'targeted killing' practices (see for example UN Doc S/PV.4945; UN Doc S/PV. 4934; UN Doc S/PV. 4357) arguing that "the European Union and the international community at large had consistently rejected the Israeli method of extrajudicial killings" (UN Doc S/PV. 4588). The Non Aligned Movement as well as the League of Arab States and the Organization of the Islamic Conference (see for example UN Doc S/PV. 5411) have similarly positioned themselves against Israeli 'targeted killing' practices at the Security Council. Considering the silence on US 'targeted killing' practices, as it for example appears in the silence on armed drone attacks at the Security Council, in the context of protest against Israeli 'targeted killing' practices at the Security Council illustrates how closely linked silence is to the power asymmetries within a particular, discursive context.

The hegemonic position of the US might also play a role regarding silence in the other counterterrorism cases cited in the first part of this Chapter. The Israeli interventions as well as the Colombian attack in Ecuador did not only receive ideological backing but also considerable amounts of military aid from the US government (Waisberg 2009, 478). During the Turkish intervention in Iraq, the US government provided military intelligence to the mission and put pressure on the Iraqi government, which did not formally complain to the Security Council (Ruys 2008, 343–45). The US also supported the intervention of Ethiopia in Somalia and later on carried out air strikes against terrorist suspects in Somalia itself (UN News Service 2007). As Gray has argued:

“In this instance states were apparently not willing to risk offence to the USA (...) by condemning what looked like an excessive use of force or by even querying its legal basis, especially when that use of force was linked to the ‘war on terror’” (Gray 2008, 244).

The colonial legacy of the acquiescence doctrine thus points to some structural silencing dynamics in the case of current silence invocations which marginalise Third World peoples. Understood within an asymmetrical world, silence reflects how not all states might have the ability to directly protest against US practices and claims – and not all acts of protest and not all voices are listened to. This is not just a question of power politics in a state-centric sense, but a question of how interpreters relate to and participate within such power relations. Ignoring the political context, silence appears as acquiescence within the modality of evidence, in which the ‘objective’ requirements of the acquiescence doctrine then work to mask the structural exclusions which are underlying invocations of silence and thus hide the “brutality of the passage of fact into law” (Stern 2000, 93).

It is important not to equate silence with exclusion from speaking and a question of power politics, not least because those who invoke silence directly participate in its phenomenological existence. In his recent article on customary international law, Chimni points to the importance of ideas in the formation of customary international law: “For a customary international law rule to emerge, it has to be voluntarily accepted by a majority of states, or at least not be actively opposed by them. While the element of power plays an important role in this process, it is also a function of the dominance or hegemony of certain ideas and beliefs” (B. S. Chimni 2018, 28). The following section argues that a one-dimensional understanding of silence as a given fact of

potential acquiescence not only neglects to take into account power relations and silencing dynamics at the inter-state level but also fails to account for the crucial participation in these silencing dynamics by non-state participants of the language game of customary international law. Not just the interpretation of silence, but its very existence, thus fundamentally depends on the assumptions through which an issue is invoked in the language game.

3.4. Creating Absence for Law

As previously discussed, legal debates of silence as acquiescence often rely on a positivist notion of observation, in which "silence is, first, a fact and a verbal omission" (Starski 2017, 22). This, however, neglects two parameters for communicative silence which are crucial for whether and how silence is noted in the first place: The assumptions of relevance and the expectations of speech by those who notice, invoke and interpret silence. The invocation of silence is thus not only a question of how the context is interpreted (e.g. whether armed drone attacks are perceived as an open, publicly known practice) but is ultimately a political question of how the context *should* be interpreted. By maintaining a high expectation of speech despite steep power asymmetries and already framing a state act as legally relevant, this interpretation is itself political. The following section problematizes each of those parameters (speech expectation and assumption of relevance) in turn, demonstrating that not just how silence is interpreted but whether silence is noted at all, is ultimately a question regarding the role of the interpreter vis a vis the political context. Even within the restrictions of doctrinal, legal principles, silence can thus also work as

confirmation of the status quo or as leaving the question of legality open. Theorising customary international law as a language game here shows how different modalities are at work – even within the same field.

3.4.1. Expectations of Speech

Not just the function of silence but whether silence is perceived at all, depends on what is listened to and how this listening takes place. This section focuses on the speech expectations in the case of silence claims in recent counterterrorism cases. I show how a lower expectation of speech within the modality of context, linked to the particular context at which utterances and silences take place, not only influences how silence is interpreted but whether silence is noted at all. I thus investigate the influence of speech expectations on methodological forms of exclusion when silence has been invoked in recent debates on a changing right to self-defence. This demonstrates how silence is not “a fact and a verbal omission” (Starski 2017, 22), but an invocation which fundamentally depends on expectations of speech by those who interpret silence.

Whenever acquiescence claims are made within the modality of evidence, instances of protest are excluded. This does not just mean the exclusion of non-state voices but also the rendering irrelevant (or not mentioning) of certain state voices. When, for example, the Colombian government killed suspected FARC fighters in Ecuador in 2008, Latin American states clearly positioned themselves in opposition to this counterterrorism use of force. The Venezuelan government mobilised tank battalions to the border with Colombia in protest (Waisberg 2009, 478) and the Organisation of American States objected to the

intervention, calling it “a violation of the sovereignty and territorial integrity of Ecuador” (OAS 2008, CP/RES.930). It is important that this protest of the most affected countries around Latin America is discounted in the overall summary of the claim “that the international community - with the exception of Latin American states - tacitly accepted Colombia's expansive interpretation of the right to self-defence” (Reinold 2011; 274) and that “none of the principal organisations of the United Nations criticized the action” (Anderson 2009; 20). Similarly, when Turkey launched its intervention against Kurdish fighters in Iraq 2008, the Arab League and the Non Aligned Movement condemned Turkey's actions (Gray 2008, 142) and China, Russia and the EU called for actors to resolve the issues through diplomatic means (Ruys 2008, 344). Yet, this is left unmentioned when silence is invoked, in that the intervention went “without being condemned by the Security Council, General Assembly, or International Court” (S. D. Murphy 2009, 126). In making a silence claim, state protest such as by the OAS, the group of Arab states or the Non Aligned Movement is weighted less relevant or entirely excluded in the story as it is told from the analytical gaze of the modality of evidence.

Particularly the expectation of speech at the Security Council is important in this regard, since many governments seem to be more restricted to speak at this forum. While, for example, governments have avoided to object to US ‘targeted killing’ practices, such as armed drone attacks, at the Security Council, there seems, to be more debate at the UN Human Rights Council. In 2014 the HRC held an “interactive panel discussion on the use of remotely piloted aircraft or armed drones in compliance with international law” (UN Doc A/HRC/28/38) with a number of state representatives participating in the discussion. In 2014,

the Human Rights Council adopted Resolution 25/22 ‘Ensuring the use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law’ (UN Doc A/69/53 2014, 53). The resolution was adopted by a vote of 29 state representatives in favour (amongst them Argentina, Brazil, Chile, China, Indonesia, Pakistan, Peru, Russia, Saudi Arabia and South Africa) and six against (USA, UK, Japan, France, Republic of Korea and the former Yugoslav Republic of Macedonia). The first sentence of the resolution refers to the prohibition of the inter-state use of force with particular reference to Article 2(4) of the UN Charter (UN Doc A/69/53 2014, 53).

The invocation of silence as absence of protest within the modality of evidence thus fundamentally relies on the methodological exclusion of speech. If, for example, expectations of protest are entirely focused on the Security Council, or if direct opposition to US practices and claims is expected, discussions of armed drone attacks, such as at the Human Rights Council, might then be missed or excluded from consideration, thus leading to the conclusion that there has been a “muted reaction [...] in regard to the U.S. drone campaign” (Plaw and Reis 2016, 243). A high expectation of speech at particular fora is thus maintained, even if there are strong silencing dynamics at play. This is, however, not the only way of engaging with state acts and reactions within the language game of customary international law, even within the confines of doctrinal, legal principles. As even the third report by the International Law Commission underlined: “The interpretation of inaction should generally be made in relative terms, account taken on the specific

(sequence of) facts and the relationship between the States involved” (UN Doc A/CN.4/682 2015, para 22).

Within, what I called the modality of context, a high speech expectation is not maintained independent of the context but the assumption stressed that “there could be various reasons for a refusal to act, including a lack of capacity to do so or a lack of direct interest” (Danilenko 1993, 108). Scrutinizing the legal intentionality of state acts, an interpretation of state silence then considers that there could be “many reasons for failure to condemn” (Gray 2008, 21). Because states are formally equal but politically unequal, the role of interpretation is understood to encompass taking care to distinguish political and legal motives: “Firstly, the position of a state must have been expressed freely, which excludes those that are essentially explained by political or diplomatic pressure” (Corten 2005, 818).

This does not necessarily stem from a different understanding of the context itself, nor from a different epistemological approach (i.e. the modality of context can be adopted through a positivist gaze) but from a different belief regarding the role of interpreters *vis á vis* this context. Speech expectations are lower if the political context is seen to potentially inhibit speech – in particular ways or at particular forums. Because state representatives can have various reasons for silence which might have nothing to do with the question of legality, emphasis is put on the circumstances of utterances and silences (UN Doc A/CN.4/682 2015, 22). It is through these assumptions that silences on practices and claims of hegemonic powers, such as the US, are then not considered as tacit consent (see for example Lobel 1999a; Corten 2005, 818) and silence works to leave the question of legality open. As Tom Ruys argued in the case of the intervention by Turkey, “the muted reaction

of third states make it difficult to identify the *opinio juris* implicit in the Turkish precedent and may also indicate that states feel uncomfortable about setting new precedents” (Ruys 2008, 359; see also Corten 2016, 788 regarding silence on the “unwilling or unable” approach). Importantly, however, lower speech expectations not only influence how silence is interpreted, but through, for instance, a methodological focus on alternative fora (such as the HRC), mean that instances of speech are registered, which the modality of evidence would miss.

Speech expectations (where, on what, in what time frame) thus change how silence is interpreted and determine whether silence is noted at all. While Chapter IV will discuss the expectation of speech as it are construed through ‘targeted killing’ as a prompt, this section showed that at a methodological level, speech expectations influence the politics of exclusion or inclusion of certain voices or certain fora. The very creation of silence as a fact to be turned into law hence depends on the expectations of those who invoke and interpret silence. Particularly when set in steep hierarchical relationships, the invocation and interpretation of silence is always a question of how the context *should* be interpreted (i.e. whether power asymmetries should be taken into account) and whether and where a high speech expectation should be maintained. It also depends on whether and how a state act is assumed to be legally relevant, a point the next section discusses.

3.4.2. Assumptions of Relevance

As discussed in the second part of this Chapter, the modality of evidence tends to anchor the question of the legal quality of silence into the legal quality of the prompt. This however already presumes that a

state practice (for example an armed drone attacks) constitutes a legally relevant prompt; in the sense that it demands our attention as something new which might come to change existing legal frameworks. The presumption of legal relevance of the prompt influences not only how silence is interpreted but what silence is seen to acquiesces to and whether silence is noted at all.

When silence is invoked as acquiescence in the modality of evidence, the legal relevance of acts is often deduced from the justification of the state perpetrating the armed intervention (De Hoogh 2016, 37). As Reinold (2011; 271) argues in the case of the Turkish intervention in Iraq: “International acquiescence in that intervention *largely reflected* Turkey’s efforts to demonstrate that its campaign avoided excessive collateral damage to civilians and non-PKK infrastructure. In a note verbale to the Human Rights Council, Turkey emphasized that it ‘targeted solely the PKK/KONGRA-Gel terrorist presence’” (Reinold 2011, 271, emphasis added). Silence is here invoked as a mirror which reflects a particular aspect – as it is seen to be framed by the state using violence. Legal relevance of this prompt is, at the same time, confirmed by the mirror function of silence which hence indicates *opinio juris*, not only of the perpetrating state but of the non-reacting states.

Silence is thus invoked in order to legally magnify (by assuming and confirming legal relevance of) a particular aspect of state behaviour. This automatically shifts analytical weight towards the practices and claims of militarily more powerful governments. The more provocative practices and claims, such as those of the US and Israeli government, then receive disproportional attention in the language game of customary international law (Gray 2008, 117). Yet, it is through the prior presumption of legal relevance that certain aspects are invoked as the

focal points in the first place, to which silence can be construed as a reflection.

While legal relevance can be based on justifications of the perpetrating states, silence can also be invoked even if the governments perpetrating the violence have not framed the practice as a legal precedent. The Turkish government, for example, has not provided a legal basis or informed the Security Council of the invocation of self-defence (Ruys 2008, 345). The Colombian government even apologised for the intervention discussed above, issuing a “pledge by Colombia, expressed by its President to the Rio Group and reiterated by its delegation at this Meeting of Consultation, that they [the events] would not be repeated under any circumstances” (Organization of American States 2008). The assumption of legal relevance of the unsaid, hence, does not simply lie in any ‘material reality’ of a practice or how states have justified the acts, but through how aspects have already been *assumed* to be legally relevant by those who invoke silence as potential acquiescence.

Not arguing that armed drone attacks or any of the practices discussed above are not legally relevant, what I want to posit here is that the legal relevance of particular aspects of such practices is presumed by the very act of noting and discussing silence as evidence. This forecloses an important debate around how any of these claims (and which ones) should be regarded as legally relevant and instead often leans on implicit assumptions which confirm legal relevance of acts and claims – by implication. As Ruth Wodak has pointed out, implication is a rhetorical move which places issues beyond discussion and can be used intentionally to manufacture consent (Wodak 2011, 47). Similar to asking a child which hat she wants to wear when going out for a walk, the main issue of going out for a walk is removed from discussion by

implication (Wodak 2011, 47). Rather than not getting involved in politics, the choice of foreclosing the debate around the legal relevance of the unsaid - a relevance through which silence becomes communicative - is a powerful choice within the language game of customary international law.

If something is not assumed to be legally relevant (relevant in the sense of potentially changing existing frameworks), silence tends to work as confirmation of the status quo. Legal interpreters who argue that ‘targeted killing’ claims are irreconcilable with international law or that particular practices are breaching existing customary international law prohibitions (see for example O’Connell 2010; Brookman-Byrne 2017), do not tend to investigate silence as tacit consent. Staying within the modality of status quo, silence on armed drone attacks and similar practices instead serves to show that there is no necessity for objection or that there is nothing which deserves a reaction, since “drones have not created a revolution in legal affairs. The current law governing battlefield launch vehicles is adequate for regulating drones” (O’Connell 2010, 599).

Silence can on the contrary be seen to work to disregard certain claims in order for them *not* to gain importance within the language game of customary international law. D’Amato, who writes on the sources of international law thus argues that silence can be a means for governments to actively ignore an exceptional practice (D’Amato 1971, 101). By ignoring a practice, State A can use silence to mark the boundaries of the legal field, to denote what is irrelevant and what does not belong within the field. Official protest would be less effective than silence which allows that the silent state “might later be able to claim that B’s act was a “political” one that had nothing to do with

international law” (D’Amato 1971, 101). Rather than discussing whether silence does or does not express consent, this dismisses the assumption that an act constitutes a legally relevant prompt. Silence thus disregards the relevance of a prompt within the language game of customary international law and works as confirmation of the status quo.

Silence fundamentally relies on the assumption of relevance by the interpreters and their expectation of speech. If the unsaid is not assumed to be relevant, silence works as confirmation of the status quo. If there is a lower speech expectation (for example because of the political context), silence works to leave the question of legality open. Yet, not only the interpretation of silence and the question whether it should be turned into law depends on the modality of customary international law – but the very construction of silence as a fact to be turned into law. Whether silence is noted at all, and thus gains any communicative function, is not fully given by the ‘material’ (silence is thus always claimed despite actual or potential instances of protest), nor is it fully determined by professional principles. The question of interpreting silence, which the modality of evidence tries to convert into a technical problem of objectively assessing available facts, cannot be escaped. It rather shows how the attempt of divorcing the act of interpretation from political questions instead serves to (re-)produce dominant and seemingly self-evident assumptions.

3.5. Conclusion

This Chapter has challenged the common-sense way of approaching silence as potential acquiescence in customary international law. I illustrated the problems of conflating silence with absence of protest and already approaching it as potential evidence in the case of recent ‘targeted killing’ debates. Drawing on my empirical analysis, I showed that silence understood as “first, a fact and a verbal omission” (Starski 2017, 22) fails to take the context into account, through which silence is produced (such as silence on US practices at the Security Council). Unpacking the problems of framing silence as tacit consent without reflecting on the discursive context which makes speech possible – both in terms of what can be spoken about and in terms of what is listened to – the Chapter examined how a technical rendering of the acquiescence doctrine masks the “brutality of the passage of fact into law” (Stern 2000, 93).

It also masks the brutality of the passage of something into fact. By analytically construing state practice and silence as an objective reality, there is a risk of neglecting how both elements are construed through assumptions and expectations by the interpreters. Analysing customary international as a language game thus showed how within different modalities, silences do not only gain different functions, but might not gain any discursive existence. Building on the contextual parameters of the previous Chapter, I demonstrated how it is implicit assumptions which inherently influence not only how silence is interpreted – but whether silence is heard at all. The invocation of silence on ‘targeted killing’ thus relies on assumptions that particular aspects of a practice, such as an armed drone attack, are legally relevant for customary

international law. It also relies on where, when and how speech is expected, excluding for example debates of armed drone attacks at the Human Rights Council, or protest by actors, such as the Non Aligned Movement. The discursive existence of silence and its interpretation is a highly political question regarding how interpreters relate to a context.

Theorising customary international law as a language game, the Chapter provided a first step to trace the crucial role of those who are normally perceived to be observers of state acts (e.g. scholars) as direct participants within the language game of customary international law, who not only interpret but also create discursive facts (such as silence). It also highlighted the importance of self-evident assumptions and expectations which determine the modality of the language game of customary international law. The more, for example, interpreters discuss whether silence could be interpreted as acquiescence, the more they reproduce the assumptions of the modality of evidence; they reproduce that there is silence (the phenomenological existence of silence) as well as a legally relevant prompt. Conceptualising customary international law as a language game instead raises the question *how* a prompt (such as ‘targeted killing’) can function as a relevant prompt, which raises a high expectation of speech in the first place. The next Chapter develops a diachronic analysis of the concept ‘targeted killing’ and argues that the delineation of practices, such as armed drone attacks, as a new, legally relevant prompt of ‘targeted killing’ is not as self-evident as it might first appear.

“But
now there are silences and the
words make help make the
silences .”⁸

⁸ John Cage ‘Lecture on Nothing’, printed in Cage (1959) *Silence*, p. 109

Chapter IV

Prompting Silence

The previous Chapter advanced a synchronic analysis of the silences of governments regarding armed drone attacks and similar counterterrorism practices and examined the assumptions at play for silence to function as acquiescence. Within the logic of the modality of evidence, the focus is mainly on the ‘material reality’ of the prompt (the state practice), to which silence is conceptualised as a re-action. This neglects to analytically account for the assumptions of relevance and expectations of speech by those who invoke and interpret silence. Challenging the notion of silence as an objectively given fact, I demonstrated the importance of implicit assumptions for the interpretation and discursive invocation of silence. I argued that the function of silence is thus linked to power relations – not only in the sense of a state-centric understanding of power politics but in the sense of dispersed power relations which determine the discursive existence of things we often take as self-evidently given.

This Chapter investigates in a diachronic analysis how ‘targeted killing’ has been able to function as a prompt. For silence to be invoked as

potential acquiescence, ‘targeted killing’ has to be more than just something that happened. It has to be something that is discursively framed as legally relevant which has raised an expectation of speech. Particularly in customary international law, state silence can only work as acquiescence if it is perceived to be a re-action to a new state practice or legal claim. As the previous Chapter showed, silence is investigated as a reaction to a practice which “calls for a response” (International Court of Justice 2008, 121), a state practice which is seen to challenge the status quo of international law. Advancing a diachronic analysis, this Chapter examines ‘targeted killing’ within a wider historical context in order to examine the role of the concept in its historical dis/continuities.

The Chapter has two parts. The first part builds on discursive approaches to IR (see for example Fierke 2002; Doty 1993a; Pin-Fat 2000) and on Wittgenstein’s philosophy of language in order to examine how ‘targeted killing’ has functioned within the language game of customary international law. I thus analyse the concept ‘targeted killing’ not through an inherent meaning but through three contradictory roles the term ‘targeted killing’ has played in current counterterrorism discourses: to (i) *justify* precision attacks according to the laws of war, to (ii) *condemn* uses of force as intentionally breaking international law and to (iii) *create* a blurred armed conflict/policing category. Within each of these invocations, the term ‘targeted killing’ could be substituted with more traditional terms such as ‘proportional use of force’, ‘assassination’, or ‘police bombing’.

My first argument is that the concept ‘targeted killing’ is not new; that is, the practices and claims it describes in each of the three invocations are not new. Even the creation of a blurred armed conflict/policing

framework for the aerial bombing of terrorists has similarities with ‘police bombing’ against insurgents in former colonies and with ‘assassinations in self-defence’ which the US and Israeli government had practiced and justified throughout the 1980s and 1990s. I thus diachronically trace the conceptual continuities of ‘targeted killing’ with these older conceptualisations of state violence against non-state actors and show how even the reaction by other states to such practices has not changed in recent decades. Protest against Israeli ‘assassinations in self-defence’ has continued at the Security Council since the 1980s, while silence on US practices – at the Security Council – has commenced since after the end of the Cold War.

What is new, however, is the way current counterterrorism discourses have used the term ‘targeted killing’ across three converse invocations, by conceptually linking it to the representation of the new technology of UAVs or armed drones. This is important for the question of how ‘targeted killing’ can work as a prompt for non-reaction. The second part of this Chapter investigates how the use of ‘targeted killing’ across its three converse invocations has distanced the term from its more traditional terminological siblings, such as ‘assassination’. This lends the concept a legal relevance it would not otherwise have and raises an expectation for governments to speak. The communicative function of silence is thus dependent on the particular discursive representation of ‘targeted killing’.

4.1. ‘Targeted Killing’ as a Prompt

Legal scholars tend to only investigate state reactions if they perceive there to be a new prompt which demands attention: “When a new practice or proposed change to the content or interpretation of existing law is advanced by a state, the reaction of other states and relevant actors to that action or claim must be scrutinized.” (Garwood-Gowers 2011, 271). It is the perceived novelty and relevance of the practice which initiates the scrutiny of researchers: “When assessing the consequences of a particular act for the development of customary international law, one must look not only at what states say, but also at what they do not say.” (Reinold 2011, 257) Without the perception of a new prompt which might change existing legal frameworks, reactions would not be scrutinized and silence not noted as lack of protest. This section empirically challenges the novelty of the concept ‘targeted killing’ in a diachronic approach which investigates the historical continuities of the claims and practices described through the term ‘targeted killing’.

4.1.1. Invocations of ‘Targeted Killing’

Building on Wittgenstein’s understanding of language, the meaning of a word does not have any substance but is created through the different ways in which it is used (Wittgenstein 1960, 108; see also Werner and De Wilde 2001). This does not mean that ‘reality’ is not important but that what is perceived as ‘reality’ is always already made sense of through language (Pin-Fat 2000, 664). As Wouter Werner and Jaap de Wilde argue in the case of state sovereignty “in order to understand the

meaning of these concepts, it is more fruitful to reconstruct their use than to look for corresponding realities” (Werner and De Wilde 2001, 286). The assumptions re-produced by using words in particular ways are intertextually linked to other signifiers which exist in the power relations of linguistic practices – in word-word relations rather than in word-object relations (Pin-Fat 2000, 664; Doty 1993a, 302). Regarding the concept ‘targeted killing’, this seems particularly important, given that the concept has been so closely linked to the idea of a material reality of the drone technology, a point I will return to further below.

Trying to avoid “the standard social science approach of attempting to fix the boundaries of definition before undertaking an analysis” (Fierke 2002, 345), this section traces how different voices (for example scholars, US officials, UN representatives) have invoked the concept ‘targeted killing’. Rather than anchoring the use of the concept ‘targeted killing’ within a particular, pre-configured site or group of actors, I investigate how ‘targeted killing’ has been used and shaped in invocations “scattered throughout various locales” (Doty 1993a, 302). Empirically, this means that this Chapter does not investigate the use of the term ‘targeted killing’ in just one source or set of sources, even though I do focus on UN documents. I particularly draw on my empirical analysis of Security Council debates between 2000 and 2016; an analysis of the United Nations Yearbook entries featuring the term ‘targeted’ between 1950 and 2016; and an investigation of UN Human Rights Council documents searched through key words of ‘targeted killing’ and armed drones. Yet, I also analyse less centralised accounts of ‘targeted killing’, for example through government policy documents and domestic legal courts and committees, as well as through how scholarship has used the concept ‘targeted killing’.

Building on Wittgenstein, the main point of this analysis is not to find the ultimate meaning or definition of the term ‘targeted killing’ but to understand the relationship between different roles which the word has assumed (Wittgenstein 1960, 182) without a priori ranking their significance. Wittgenstein argues that there is "family resemblances" between the different uses of a word, like family members who have certain similarities in height, facial features, voice, character, etc. but there is not one exclusive trait they all share compared to others (Wittgenstein 1960, 67). The following section analyses the term ‘targeted killing’ by tracing three different roles of the term ‘targeted killing’ in the documents I investigate (sometimes different invocations are used within the same document). Rather than trying to arrive at one common denominator of them, I analytically disentangle the different invocations of ‘targeted killing’ in order to more effectively examine how ‘targeted killing’ can discursively work as a new prompt which raises an expectation of speech.

The first way in which the term ‘targeted killing’ has been used follows the grammar of armed conflicts and denotes that military force is directed at combatants in order to reassure that “there must be near-certainty that no civilians will be killed or injured” (Barack Obama 2013). US state representatives (Harold Koh, Department Of State 2010; Barack Obama 2013), military elites and scholars from security studies (Tinetti 2004; Wilner 2010) have thus employed the term ‘targeted killing’ in order to underline the precision of attacks. The use of the term ‘targeted killing’ here invokes the International Humanitarian Law (IHL) requirements for the distinction between combatants and civilians and is used in order to justify violence through stressing the precision of attacks concomitantly with words such as

‘proportional attack’. The main *function* of the use of the term ‘targeted killing’ in this invocation is to express compliance with existing IHL parameters.

The second way in which the term ‘targeted killing’ has been applied is at the diametrical opposite to this. The term is here used in order to designate unlawful uses of force directed particularly at civilians and the term has the role to condemn intentionally law-breaking acts, such as the attacks on civilians by Taliban forces in Afghanistan in the “targeted killings of civilians” (UN Doc A/HRC/31/46 2016, 3), the assassination of government officials in “targeted killings by insurgent groups” in Mogadishu (UNYB 2009, 279), or the “persistent suicide attacks and targeted killings and the use of improvised explosive devices” by terrorist groups (UN Doc S/PV.7181 2014). UN officials and state representatives at Security Council debates and the Human Rights Council have used the term ‘targeted killing’ in this condemning function (see for example Security Council debates UN Doc S/PV.6173 2009; UN Doc S/PV.5942 2008; UN Doc S/PV.4990 2004; UN Doc S/PV.7109 2014). In the resolution on the ‘Use of Armed Drones’ the EU Parliament similarly called on states to “not perpetrate unlawful targeted killings” (European Parliament 2014). The term ‘targeted killing’ is here invoked as a means to highlight that acts of violence are intentionally breaking international law requirements such as the “targeted killing of journalists” (UN Doc S/PV.7003 2013). Important for this Chapter is not whether or not particular acts are regarded as unlawful, but that the term ‘targeted killing’ is invoked *in order to* express this unlawfulness. As will be discussed in more detail below, the term is here applied almost interchangeably with older terms such as ‘assassination’ or ‘extrajudicial killing’.

The third role of the term ‘targeted killing’ has been to produce a new legal category to describe state acts which are seen as fundamentally different to traditional uses of force. The term ‘targeted killing’ has thus been used in some US and Israeli justifications of counterterrorism use of force (see for example Brennan 2012; Respondents’ Argument Israeli Supreme Court Judgement HCJ 769/02 2006 para 12; Barack Obama 2013), by scholars investigating the changing nature of warfare (Chamayou 2015a; Gunneflo 2016) as well as by Human Rights activists and practitioners (UN Doc A/HRC/31.56 2014, 56; ICCT 2016) in order to designate a category for a new kind of use of force taking place outside of the frameworks for war and peace as traditionally understood. The British Joint Committee on Human Rights, for example, issued a report on ‘The Government’s Policy on the Use of Drones For Targeted Killing’ in order to investigate acts justified along new, legally contested lines – as opposed to the use of drones within traditional armed conflicts. The term ‘targeted killing’ has thus been used to differentiate the use of drones within armed conflicts from the new claims the practice has raised, pointing to “the challenges that these [drone] systems bring to international law (...), particularly when drones are used for targeted killing” (Saura 2016, 122).

The term is in this third invocation used to investigate or describe a new phenomenon which is understood to have “blur[ed] the line between war in the traditional sense on the one hand and countering the crime of terrorism on the other” (Joint Committee on Human Rights 2016, 6). This invocation of the concept ‘targeted killing’ is connected to legally contested claims such as the use of force aimed at specific individuals outside of “areas of active hostilities” (The White House 2013) in cases when there is no invitation by the territorial government

and the state is not claimed to be responsible for the terrorist activity but deemed “unable or unwilling to take action against the threat” (Brennan, 2012: 7). The term ‘targeted killing’ has been used as a new category to justify, discuss, or critique claims and practices which are closely wrapped into a de-territorialised and individualised understanding of armed conflict (Gunneflo 2016; Chamayou 2015b; Shaw, Graham, and Akhter 2012). It is ‘targeted killing’ in this third invocation of creating an armed conflict/policing hybrid which has prompted heated debates on whether customary international law is changing to allow such uses of force, through which armed drone attacks outside of traditional zones of armed conflict have been framed as potentially lawful (Anderson 2009; Brooks 2014; Plaw and Reis 2016; O’Connell 2010; Radsan and Murphy 2009; UN Doc A/HRC/28/38 2014; UN Doc A/HRC/14/24/Add.6 2010b).

These debates have been complicated because of the controversies (or rather the parallel existence) in how the term ‘targeted killing’ has been used in order to: (i) justify uses of military force against groups of combatants following the principle of distinction; (ii) condemn uses of force which are seen to break international law principles because they are directed against (groups of) civilians by state or non-state actors; (iii) create a category for new types of state violence which blur traditional understandings of armed conflict and law enforcement. The different uses of the term have some “family resemblances” with each other, as Wittgenstein would call them (Wittgenstein 1960, 67). Yet, if we were to develop one overarching definition, we would end up with a very broad description, such as ‘targeted killing’ is “the intentional targeting of a person with lethal force intended to cause his death” (Anderson, 2009: 9). A broad definition like this ends up saying little; it expresses

that a particular use of violence was intended to kill a particular (group of) people – which could also be the definition for terms such as murder, assassination, lethal attack, extrajudicial killing, terrorist attack etc.

Because of this definitional problem, some legal investigations of ‘targeted killing’ conclude that it is impossible to judge the general lawfulness of ‘targeted killing’. Instead, the concrete circumstances of the particular invocation have to be investigated – as would be the case for any killing (see for example UN Doc A/HRC/14/24/Add.6 2010b; UN Doc A/68/389 2013, 3). Another approach to the definitional problem delineates the term ‘targeted killing’ in more precise ways for specific purposes, thus drawing an explicit line around the term and excluding other uses, for example by defining ‘targeted killing’ as “the intentional slaying of a specific alleged terrorist or group of alleged terrorists with explicit government approval when they cannot be arrested using reasonable means” (Fisher 2007, 715; see similarly Radsan and Murphy 2009). Following Wittgenstein’s understanding of language, both the first solution to develop and work with a common, broad definition and the second solution to explicitly design a more specific definition can be useful for particular purposes; yet it neglects to analyse how the contradictory roles of the term interlink. Because words are built from layers of their applications (Wittgenstein 1960, 164), the different uses of the term are connected to each other, speak to each other and contest each other, through which, I argue, the concept ‘targeted killing’ has gained the particular connotations which differentiates it from terms such as ‘murder’, ‘proportional attack’, ‘extrajudicial killing’ or ‘assassination’.

I suggest that the novelty of the legal concept ‘targeted killing’ stems more from this interplay between the use of the same term in these three discrepant invocations within current war on terror discourses on armed drone attacks – through which the concept has gained legal relevance and raised an expectation of speech. The novelty stems less from the phenomena it describes or the way it could be defined in any one of its applications. This is a straightforward argument for when the concept is used interchangeably with the older terms ‘assassination’ or ‘extrajudicial execution’. It is also quite self-evident for when the term ‘targeted killing’ is used in order to justify use of force through invoking compliance with enshrined principles of distinction and proportionality. However, the term ‘targeted killing’ has also been used in a third invocation in order to designate a *new* set of legal claims about state violence.

The report on ‘targeted killing’ by the British Joint Committee on Human Rights thus urges the UK government to respond to the “new and fast-moving challenges of counterterrorism today (...) by clarifying its understanding of the legal framework which governs its policy on the use of lethal force abroad for counterterrorism purposes outside of armed conflict” (Joint Committee on Human Rights 2016a, para 6.1.). This builds on calls of the UN Human Rights Council to clarify the applicable legal framework for counterterrorism force, relating in particular to the use of armed drones in ‘targeted killing’ attacks outside of armed conflicts (Human Rights Council 2014). Using the term ‘targeted killing’ to describe a new phenomenon is often linked to questions whether the right to self-defence has changed after 2001 or whether it should change in order to adapt to new realities of warfare. The use of the term ‘targeted killing’ is here connected to the practice

of armed drone attacks and while the weapons themselves are not necessarily regarded as problematic, it is often emphasized that “the use of armed drones *for targeted killings* raises serious questions in terms of human rights and other branches of international law” (EU Parliamentary Assembly 2015; emphasis added).

Using the term ‘targeted killing’ to create a new category to designate state violence outside of traditional legal frameworks might be seen as a reaction to the new threat of transnational terrorism and the new technological possibilities of warfare, which could be argued to transform the nature of modern armed conflicts. Not directly addressing this claim, the following part of the Chapter critically engages with the novelty supposition by contextualising the linguistic practices of invoking ‘targeted killing’ as a new category of warfare within a wider historical perspective. I examine concepts such as ‘air policing’ or ‘police bombing’ in the colonial context and terms such as ‘assassination in self-defence’ or ‘defensive reprisal’ in more recent decades - not in order to argue they are all the same (of course they are embedded in diverse political contexts) but as a heuristic device to trace the conceptual continuities.

4.1.2. Something Old

Parallels between current counterterrorism measures described with ‘targeted killing’ and colonial practices of ‘police bombing’ or ‘air policing’ have not only been described by critical scholarship (Neocleous 2013; D. Gregory 2011b); the US Department of Defence itself has pointed to parallels in a 2006 report (Todd 2006) and the US Air Force has conducted research on the colonial practices of the British

Royal Air Force (RAF) since “air policing was deemed highly effective at enforcing British mandates across much of her empire, including the current-day land mass of Iraq, and has practical application for today.” (Murphy, 2009: 4). Existing literature has elaborated on the cultural and political continuities between these practices more extensively (Lindqvist and Rugg 2003; Neocleous 2013; Satia 2014). I focus here on the use of the concepts ‘police bombing’ or ‘air policing’ in order to demonstrate that the novelty of the concept ‘targeted killing’ stems less from the novelty of the claims and practices it describes in its third invocation.

The practice of ‘police bombing’ or ‘air policing’ was an important feature of European military strategy in the mandate system of the interwar years. By the 1920s, the British government thus used airplanes for the surveillance and subjugation of non-state actors in Afghanistan, Iraq, Egypt, Punjab, Yemen, Palestine, Somaliland and South Africa. The Italian government similarly employed ‘police bombing’ in Libya and the French government in Morocco and Syria (Neocleous, 2013: 581). The reason why targeted attacks from airplanes were seen as effective in controlling colonies and mandates was linked to the perception of the territories and inhabitants. The new technology of airplanes was seen to enable continuous surveillance of territories which were portrayed as wild, inscrutable land consisting of treacherous deserts and rugged mountains (Colby 1927; Satia 2014). The new technology was thus framed as providing a panoptical surveillance system everywhere at once and was linked to the concept ‘air policing’ to designate forms of violence which were “both economical and humane since it inflicts neither great nor permanent suffering upon the

people against whom it is used nor heavy casualties among those who have to wield it” (AIR 20/674, cited in Killingray, 1984: 449).

The alleged precision and humaneness invoked with the term ‘air policing’ thus connoted that such attacks were of a small scale which did not amount to an armed attack in the same manner an invasion would. This was particularly relevant regarding the military intervention in formally sovereign or quasi-sovereign countries within the mandate system of the League of Nations. It was contrasted with the deployment of ground troops in traditional armed conflicts and portrayed as less invasive in comparison. As the British Air Ministry argued in the case of Iraq: “in countries of this sort (...) the impersonal drone of an aeroplane (...) is not as obtrusive as soldiers” (PRO, AIR 2/830 1929, cited in Satia, 2014: 7).

This resonates with the use of the concept ‘targeted killing’ today. As indicated through the term ‘targeted killing’ itself, military violence is thus portrayed through its “surgical precision”, as CIA Director Brennan has put it (2012). A recurring comparison is made with ground-troop invasions in order to emphasize that the small scale of violence from the air does not infringe the sovereignty of the victim state in comparison to the deployment of ground troops which would “lead us to be viewed as occupying armies” (Barack Obama 2013). As Trevor McCrisken put it: “Washington obviously wants to avoid using ground troops in Pakistan due to the political consequences of violating national sovereignty” (McCriskin 2013, 105). Rather than invading or attacking these states, the term ‘targeted killing’ has thus been used to designate police-like military interventions with “rigorous standards and process of review” (Brennan 2012). ‘Targeted killing’ has thus been critiqued for how it blurs the categories of law enforcement and armed

conflict (McCracken 2013, 105; Kessler and Werner 2008b; Krasemann 2012). As Oliver Kessler and Wouter Werner put it: “Suspected terrorists are targeted, not because of their formal status as such, but rather because they are believed to be guilty of terrorist attacks in the past and believed to constitute a mortal threat in the future”, which means that “states borrow the language and moral force of the law enforcement paradigm (‘crime and punishment’), without accepting all the responsibilities that normally come with it” (Kessler and Werner 2008a, 305).

The legal hybridity (between law enforcement and armed conflict) is another parallel to past uses of the concept ‘police bombing’. The terms ‘air policing’ and ‘police bombing’ are themselves indicative of how the practice was depicted less as an element of armed conflict and more as constituting a mechanism to enforce law and order in (former) colonies: “Once the tradition of the power of the air is established, law and order in fact will be maintained.” (AIR 9/15/3, in Killingray, 1984: 437) This argument was questioned by others, some of whom followed the presented police logic and argued that subject peoples of the Empire should be protected from military measures and not subjected to it (House of Lords Debate 1930, cited in Killingray, 1984: 440). Yet, as has been pointed out by critical International law scholars (Anghie 2006; Anghie and Chimni 2003), in the colonial territories the differentiation between wartime and peacetime was blurry and ‘unpacified’ places were exempted from the respective frameworks of international law. As a consequence, principles of civil rights as well as the customary principles of the laws of war, such as the principle of distinction, were suspended or measured on a different scale. As the High Commissioner of Iraq argued in 1932: “the term ‘civilian population’ has a very

different meaning in Iraq from what it has in Europe (...) the whole of its male population are potential fighters as the tribes are heavily armed.” (PRO AIR 8/94, cited in Satia, 2014: 10).

This leads to the third parallel between the use of the concepts ‘police bombing’ and ‘targeted killing’, which is a discriminatory notion of the principle of state sovereignty. The use of the concept ‘targeted killing’ has been restricted to certain areas in the world. Thus it has been argued by Radsan and Murphy, two supporters of ‘targeted killing’, that “it would be beyond bizarre to argue that the US could legally fire a missile at an al-Qaida operative in Toronto” (Radsan and Murphy 2012, 451). Instead, ‘targeted killing’ is discursively linked only to certain regions where “the state only has the most tenuous reach into the territory” (Barack Obama 2013). Based on the so-called “unwilling or unable doctrine”, the concept of ‘targeted killing’ here denotes a discriminatory approach to state sovereignty which is based on the attacking state’s estimation of the other government’s willingness and capacity. This justification of ‘targeted killing’ is often based on an understanding which, according to Radsan and Murphy, “makes common sense. The United States may not carry out drone strikes in, to give a few examples, the United Kingdom, France, and Canada. These countries exercise thorough control over their territories and are unequivocally opposed to al Qaeda. Nations other than Afghanistan where drone strikes have occurred, such as Pakistan and Yemen, fall into a gray zone” (Radsan and Murphy 2012, 453–54). This common-sense understanding of the geographical restriction of ‘targeted killing’ then actually tends to legitimize use of force in the same regions as it did in the case of ‘police bombing’ (see for a more thorough discussion of geographies

Neocleous 2013, 581; for a critique of the “unable and unwilling” approach Corten 2016; Ahmed 2013).

Unlike the colonial context of ‘air policing’, this discriminatory aspect of ‘targeted killing’ does not sit comfortably with current understandings of formal equality between sovereign states and even scholars who support the lawfulness of ‘targeted killing’ (in its third invocation) have referred to this difficulty: “The United States (...) wants it known that its agents will not undertake targeted killings in the United Kingdom under any circumstances, even if they might in Somalia (...). Here a rule of international law will necessarily not avail us; because of the formal equality of states, international law rules will have great trouble separating the Britains from the Somalias. Yet that is precisely what policy as a practical, substantive matter requires.” (Anderson, 2009: 29)

Current proponents of ‘targeted killing’ are not the first to take issue with the formal equality of states in the UN system of international law. Aerial bombings of insurgents on foreign territory have been justified a number of times over the last decades and legal claims similar to those today were unsuccessfully proposed during the Cold War. For example, in 1958, France justified the bombardment of terrorists on Tunisian territory as a measure of self-defence because Tunisia had enabled border incursions into French territory in Algeria and had “not shown itself capable of maintaining order” (UN Doc S/3954 1958). Portugal similarly justified its repeated infringement of Senegalese territory in 1969 as self-defence, since Senegal had been “aiding and encouraging violence against Portuguese territories” (UNYB 1969, 138), and South Africa argued that it was justified in killing SWAPO insurgents in Zambia in 1976 since Zambia had tolerated armed groups on its

territory (UNYB 1976, 164). The US aerial bombings against suspected terrorist targets in Libya 1986 were justified with the right to self-defence against terrorists in countries which provided a safe harbour for terrorists to train in (UN Doc S/PV.2674 1986) and the Israeli 1978 bombardment of Lebanon was justified on the basis of the right to self-defence to clear PLO from southern Lebanon where “an absence of law and order reigned” (UNYB 1978, 297). These acts were objected to by state representatives as colonial use of force and nearly all of them were even condemned as acts of aggression by the Security Council (UN Doc S/RES/393 1976; UN Doc S/RES/273 1969; UN Doc S/RES/248 1968; UN Doc S/RES/425 1978; UN Doc A/RES/41/38 1986).

Even the preventive killing of particular, named terrorist suspects on foreign territory had been justified before 2001. These justifications used terms such as ‘defensive reprisal’, ‘defensive assassination’ or ‘assassination as anticipatory self-defence’ (see for example Beres 1991). It was most notably the Israeli government which practiced and justified such assassinations. In 1988, for example, the Israeli government killed Mr. al-Wazir, a terrorist suspect in his home in Tunisia outside of an area of armed conflict and justified the attack with “the need for action against international terrorism”, pointing to the involvement of Mr. al-Wazir in multiple terrorist attacks (UNYB 1988, 229). This line of argumentation did not convince other states and the Security Council condemned the attack (UN Doc S/RES/611 1988).

The discussion above has highlighted conceptual continuities of practices and claims similar to ‘targeted killing’ in its third invocation, of counter-insurgency uses of force, justified through a blurred conceptualisation of criminal justice and armed conflict. I thus challenged the notion that ‘targeted killing’ claims and practices are new

in a material sense. It could of course be argued that what has changed more recently is not the practices and claims themselves, but the reaction of other states. As Chapter III indicated, within the modality of evidence the silence of and at the Security Council is thus often understood as demonstrating a major shift of *opinio juris* by governments regarding counterterrorism use of force after 2001. The next section investigates the Security Council debates on US and Israeli practices and claims in the 1980s and 1990s regarding reactions to the above cited practices and shows that silence on US practices – at the Security Council – seems to have commenced after the end of the Cold War, not after 2001, and is juxtaposed by continuing protest against Israeli ‘targeted killing’ practices and claims.

4.1.3. Something Silent

As discussed above, the US government has held an expansive notion of the right to self-defence and has used and justified counterterrorism use of force on foreign territory for decades. In 1986, the US Air Force launched an armed attack in Libya which the US representative justified as targeted counterterrorism use of force: “On 14 April, in exercise of the inherent right to self-defence (...) United States military forces executed a series of carefully planned air strikes against terrorist-related targets in Libya” (UN Doc S/PV.2674). While a Security Council resolution was vetoed, the attacks “met with substantial and immediate criticism by the world community” (Intoccia 1987, 177) and were followed by a number of Security Council debates. The delegations at the Security Council voiced critique of the “brutal, barbaric attack” (UN Doc S/PV.2675), the “unlawful, inhuman military raids” (UN Doc

S/PV.2675) and “aggressive armed attacks” (UN Doc S/PV.2676) in no uncertain terms and condemned the bombing as a “form of State terrorism” (UN Doc S/PV.2675). The General Assembly passed a resolution in November, which condemned the US intervention (UN Doc A/RES/41/38).

Many of the Security Council statements on the US counterterrorism use of force in 1986 are theatrical speeches, linking condemnations of the attack to a wider critique of US foreign policy with explicit references to the “extreme disparity of power between the two parties to the dispute” (UN Doc S/PV.2675) as the representative of Oman put it. The Syrian representative states that “American arrogance has reached such a point that no country can tolerate any longer” (UN Doc S/PV.2675) and the Bulgarian representative perceives that “the United States, which, driven by a dangerous and pathological ambition to play the role of world policeman, has arrogated to itself the right to attack and punish inconvenient sovereign States either in its immediate geographic vicinity or thousands of miles away from its own shores” (UN Doc S/PV.2675). The US counterterrorism measures are thus discursively connected to larger “imperialist plots” (UN Doc S/PV.2675) within the Cold War context.

More cautious statements at the Security Council, particularly from governments of the Non Aligned Movement, also condemn the attack and regret “that force has been used by none other than a permanent member of the Council against a small developing country” (UN Doc S/PV.2679) with, as the Nicaraguan representative puts it, “the imperial and anachronistic ambitions of a Government that has set itself up as legislator, prosecutor, judge and policeman of the conduct of other sovereign countries.” (UN Doc S/PV.2680). Speakers from non-

aligned and small states such as Ghana repeatedly raise concerns over the US intervention “since it could mean that a permanent member of the Security Council, exercising a superior military power, could ignore all the norms of international behaviour and, whenever it felt like exercising its military muscle, launch an armed attack”(UN Doc S/PV.2680).

Such explicit references to international power structures are also alluded to in the 1985 and 1988 Security Council debates on the Israeli targeted counterterrorism uses of force in Tunisia. Speakers refer to Israeli military expansionism with “its policy of aggression and expansion against the Palestinian and other Arab peoples” (UN Doc S/PV.2611) and the “impunity by virtue of the indulgence heaped upon it even in this Council” (UN Doc S/PV.2807) as the Algerian representative puts it. The Israeli counterterrorism uses of force are condemned in the strongest terms, because “whatever the background may be, cannot be condoned” (UN Doc S/PV.2611) as the Australian representative phrases it. The attacks which Israel justifies with the right to self-defence against terrorism are condemned as a “flagrant and brutal blow to the goal shared by the international community as a whole”(UN Doc S/PV.2807) by the representative of France, “an outrage committed on Tunisian soil”(UN Doc S/PV.2807) by the representative of the UK or “horrific slaughter” (UN Doc S/PV.2808) as the Italian representative puts it. In all three debates, the term terrorism is used equally to refer to the use of force by non-state actors and the acts by states, often in the same sentence, such as the statement by the representative of Oman, that “individual acts of terrorism cannot be met with greater terrorism on the big-Power level”(UN Doc S/pV.2675) or the condemnation by the British representative that the

Israeli assassination of Khalid al-Wazir in Tunis “was a senseless act of terrorism” (UN Doc S/PV.2807).

In 1993, the US government carried out a counterterrorism intervention “designed to damage the terrorist infrastructure of the Iraqi regime” (UN Doc S/PV.3245), as the American spokeswoman puts it. The Iraqi representative protested against this use of force as an infringement of state sovereignty and a Security Council debate took place; but the language at this debate is quite different to the language in 1986. The French representative argued that it “fully understands the reaction of the United States and the reasons for the unilateral action by the United States force, in the circumstances under which it was carried out” (UN Doc S/PV.3245). The Brazilian representative merely observed that “the alarming situation characterized by the information conveyed to this Council is an extraordinarily serious one” (UN Doc S/PV.3245) and “the Chinese delegation is deeply concerned about what took place yesterday and deeply regrets the civilian casualties caused thereby” (UN Doc S/PV.3245). Even the speaker for the Non Aligned Movement only states that “the Governments and peoples of our countries deeply regret the loss of life caused by the attack on the Iraqi intelligence headquarters in Baghdad” (UN Doc S/PV.3245). This reluctance to condemn the use of force seemed to be mostly confined to the Security Council debates, with the League of Arab States protesting against the intervention *outside* of the UN (see Ibrahim 1993; Surchin 1995; 467).

Of course, the political context of the intervention in Iraq in 1993 is very different to the 1986 intervention in Libya, not least because of the Gulf War in 1991. Yet, a similar shift in the language regarding US counterterrorism use of force seems to be present after the 1998 bombings by the US which were justified as a response to the terrorist

attacks of US embassies in Nairobi and Dar Es Salaam. The US government had ordered missile strikes at sites in Afghanistan and Sudan as acts of self-defence “in response to these terrorist attacks, and to prevent and deter their continuation” (UN Doc S/1998/780). The Pakistani representative issued protest to the attack in a letter to the Security Council, arguing that “such action, if condoned, sets a precedent which can encourage other countries to pursue aggressive designs against their neighbours on flimsy or unsubstantiated pretexts” (UN Doc S/1998/794). But even though the Non-Aligned Movement, China and a number of Arab countries protested against the US intervention, this was again outside of the Security Council and “the Security Council did not meet publicly to evaluate the US military action” (Lobel 1999, 537).

It has been argued that this silence signifies “that the international community has become more accepting of forceful responses to state-sponsored terrorism” (Surchin 1995, 486) or of any kind of counterterrorism use of force from the 1990s onwards (Tams 2009). Yet, not only has protest continued outside of the Security Council but the language at the Security Council seems to have changed less during the same time frame when it comes to Israeli justifications of counterterrorism uses of force. Statements at the Security Council, condemning Israeli ‘targeted killing’ attacks in 2003, 2004 and 2006 are similar in the way protest is voiced of the attacks which are described as “a patent violation of international law” (UN Doc S/PV.4836) by the Spanish representative, “a disproportionate and inappropriate use of force that threatens the sovereignty and territorial integrity of Lebanon” (UN Doc S/PV.5489) by the Russian representative, an “armed aggression” (UN Doc S/PV.5489) by the Chinese representative, a

“violation of the sovereignty of a neighbouring State” (UN Doc S/PV.4836) by the German representative, “a barbaric military campaign” (UN Doc S/PV.5489) by the representative of Qatar and “a grim business and an unacceptable violation of international law and the rules of sovereignty” (UN Doc S/PV.4836) by the French delegation.

While the language at the Security Council thus seems to have changed considerably in response to US practices and claims after the end of the Cold War, it seems to have been quite continuous regarding Israeli counterterrorism uses of force. The above discussion only provides a brief overview of the changes and continuities in the discourse of the Security Council with a limited amount of cases and it would be helpful to conduct a more expansive investigation than is possible to undertake within the limits of this dissertation. The above discussion does, however, open up some questions regarding the supposition of change of reactions after 2001, which is perceived to demonstrate a shift in *opinio juris*. Not only are there conceptual continuities from ‘air policing’ in the colonial context to ‘defensive assassination’ in more recent decades, which describe very similar sets of legal claims as ‘targeted killing’ (in the third invocation), but even the pattern of reaction to these practices seems to not have changed substantively. There are, of course, important contextual differences between all of these cases; yet the continuities seem striking enough to raise the question *how* ‘targeted killing’ can work as a new prompt for reaction in the language game of customary international law.

4.2. Raising Relevance and Expectation

The last section investigated the concept ‘targeted killing’ in a diachronic analysis. I differentiated three invocations in which the term has been used to (i) *justify* precision attacks according to the laws of war, to (ii) *condemn* uses of force as intentionally breaking international law and to (iii) *create* a blurred armed conflict/policing category. I argued that the practices and claims ‘targeted killing’ describes in any one of these invocations is not new. Even the creation of a blurred armed conflict/policing category has conceptual continuities with older concepts, such as ‘police bombing’ and ‘assassination in self-defence’.

This section investigates how it is possible that ‘targeted killing’ can – despite these continuities – function as a new prompt which raises an expectation of speech. I argue that the word-word relation between ‘targeted killing’ and the discursive representation of the new drone technology has played an important role in leading to the above discussed use of the same term across its three different invocations. It is through the multi-layered use of the term across all three invocations, I argue, that the concept has lost its association with more traditional terms (such as ‘assassination’) and has raised an expectation to speak. The peculiar novelty of the concept thus sets the language game of customary international law up in a particular way, through implicit assumptions which risk to favour the analytical gaze of powerful actors who have pushed towards a more expansive interpretation of the right to self-defence.

4. 2. 1. Something Borrowed

From its inception, has the use of the term ‘targeted killing’ been closely linked to the discursive representation of the new technology of armed drones. Debates on ‘targeted killing’ often emphasize the novelty of the technological capacity and use of Unmanned Aerial Vehicles (UAVs), which has raised important ethical and political questions of how territories are viewed in current surveillance and targeting missions (Sauer and Schörnig 2012; Gregory 2011b; Cudworth and Hobden 2015; Schwarz 2016; Kindervater 2016). The new technology has been investigated in connection to the asymmetry of ‘targeted killing’ practices and the power dynamics in the current use of armed drones amounting to what has been called the “necropolitics of drones” (Allinson 2015; see also Shaw, Graham, and Akhter 2012; Wilcox 2016; Chamayou 2015).

The term ‘targeted killing’ itself has only appeared in the context of the so-called war on terror and in particular with the start of armed drone attacks. Searching the United Nations Yearbook from 1950 to 2011, the exact phrase ‘targeted killing’ appears in 15 documents, 13 of them after 2003. Academic literature shows an even more extreme trend regarding the use of the term ‘targeted killing’. Google Scholar returns 367 articles with the exact term ‘targeted killing’ in the title between 1950 and 2015, of which 306 were produced in the social scientific field (the term ‘targeted killing’ is also used in biology to describe the targeted killing of cancer cells). All but 1 of the 306 social scientific articles with ‘targeted killing’ in the title was published after 2003.

Not only has the use of the term ‘targeted killing’ chronologically been established at the same time as armed drone attacks have increased, they

have also been conceptually linked together. This link might be based on an understanding of a word-object relationship (Pin-Fat 2000, 664) between ‘targeted killing’ and the drone technology (words as anchored into a material reality outside of language). As Jaume Saura put it: “the fact that armed drones make it so much easier to kill people in remote areas has established a strong linkage between drones and targeted killing” (Saura 2016, 123). Investigating the concept instead through the word-word relations (Pin-Fat 2000, 664) between ‘targeted killing’ and the discursive representation of drone attacks, shows how the novelty of the concept ‘targeted killing’ is linked to the representation of the new technology to a point at which any attack with an armed drone might be called ‘targeted killing’ – across the three converse invocations of the concept discussed above.

‘Targeted killing’ is often invoked hand in hand with the new technology of drones. Thus, for example, has the Parliamentary Assembly of the Council of Europe issued a report on “Drones and Targeted Killings” (European Committee of the Council of Europe 2015); the British Joint Committee on Human Rights has published a report titled ‘The Government’s policy on the use of drones for targeted killing’ (Joint Committee on Human Rights 2016b); and the International Centre for Counter-Terrorism brought out a research paper titled ‘Towards a European Position on Armed Drones and Targeted Killing’ (ICCT 2016). Anglophone scholarship shows a similar trend of linking the term ‘targeted killing’ to the discursive representation of armed drones, in papers such as ‘Targeted Killing and Drone Warfare’ (Anderson 2011), ‘Drones and Targeted Killing’ (Tutu 2014), ‘Targeted Killing at a Distance: Robotics and Self-Defence’ (McCormack 2012), ‘Preventive Force: Drones, Targeted Killing, and the Transformation of

Contemporary Warfare’ (Fisk and Ramos 2016), or ‘Just & Unjust Targeted Killing & Drone Warfare’ (Walzer 2016).

The discursive link between ‘targeted killing’ and ‘drones’ might be explained through a word-object relationship, for example through the new capacity of the drone technology to adhere to the International Humanitarian Law (IHL) requirements of distinction and proportionality. While the technological capabilities of armed drones have also led to a more extended list of targets (Beard, 2009: 414), the technology has often been seen as a promise of precision and has arguably increased the perceived legitimacy of such attacks (Walters, 2014: 106). The Committee for Legal Affairs of the Council of Europe thus highlights in its report on ‘targeted killing’ that the “improved precision of drone strikes provides the opportunity to improve compliance with international humanitarian and human rights law” (European Committee of the Council of Europe 2015, 3).

By linking the concept ‘targeted killing’ to the technological capacity of drones, the discussion on ‘targeted killing’ hence often circles around the adequacy of technical procedures to establish the combatant status or guilt of terrorist suspects (UN Doc A/69/53 2014). This discussion has surfaced again recently with the critique of changes in the ‘drone policy’ of the new Trump administration (Stohl, 2017). Here, even Human Rights groups can end up affirming the centrality of questions of precision when they move within the rationality of distinguishing targets from civilians and demanding more transparency and details of the targeting process (see for a similar critique Grayson 2012, 30; Walters 2014, 108; T. Gregory 2015). By focusing on questions of distinction, however, attention is distracted from the problem of using military weapons in the first place: “something important always seems

to get lost when we try to translate the experiences of those killed and injured by drones into debates about discrimination, proportionality, and necessity” (T. Gregory 2015, 209).

The emphasis on the new drone technology in discussions of ‘targeted killing’ also contributes to the way in which *adherence* to the laws of war (*Jus in Bello*) has been used to distract from, or even justify, *resort to* the use of force (*Jus ad Bellum*) (Walters, 2014; see also Kennedy, 2009:125), which is why “little attention has been turned to the separate issues under the *jus ad bellum* and the question as to whether or not Americans are entitled to breach the territorial sovereignty of the above-mentioned states and conduct the targeted operations on their territory” (Henriksen 2014, 215). Ian Shaw and Majed Akhter argue that it is “*through* fetishization that drones bomb sovereign Pakistani territory without the legal and territorial consequences of ground war” (Shaw, Graham, and Akhter 2012, 1502, emphasis in the original)

It is difficult to explain why international law inquiries into customary interpretations of self-defence should be preoccupied with the question whether a Hellfire missile is deployed from a conventional aircraft or from a remotely controlled one. The legal framework for *Jus ad Bellum* (which includes the question of whether a ‘targeted killing’ constitutes a lawful exercise of the right to self-defence) is separated from the *Jus in Bello* framework. Based merely on legal principles, the language game of customary international law regarding the question of an evolving right to self-defence would thus not be concerned with the technology of armed drones at all. Through the implicit discursive link between ‘targeted killing’ and ‘armed drones’ discussed above, different invocations of ‘targeted killing’ have, however, been conflated. The next section argues that it is through this use of the term ‘targeted killing’

across all three invocations, that the concept has been distanced from its terminological siblings, such as ‘assassination’ and can be invoked as a new prompt which raises expectations of speech. This has had powerful implications for how some of the legally highly contentious practices and claims advanced in the wake of the concept ‘targeted killing’ have been approached within the language game of customary international law.

4. 2. 2. Something New

Questions regarding the novelty of ‘targeted killing’ have mostly been raised regarding the similarity of the term with the concept ‘assassination’ (see for example Grayson 2012; Krasmann 2012; UN Doc A/HRC/14/24/Add.6 2010b). As Krasmann (2012, 668) points out, it is surprising how ‘targeted killing’ as a concept “manages to present itself as a legitimate security technology and to gradually discard its historical association with the practice of political assassination.” This Chapter argues that even though the term ‘targeted killing’ could be substituted with older terms within each of the three invocations I developed above, there is still something new about the concept. I suggest that the novelty stems precisely from the way the concept has been used across the three invocations at the same time within current discourses on counterterrorism uses of force, and in particular through debates on armed drone attacks. It is through this interplay that ‘targeted killing’ has established itself as a legally relevant prompt in the language game of customary international law.

When ‘targeted killing’ is used in its second invocation in order to highlight that a particular use of force is unlawful, the term appears as

an equivalent to the terms ‘assassination’ or ‘extrajudicial killing’. Some state representatives indeed seem to use the three terms almost interchangeably, as the German representative in the following Security Council statement: “My Government is gravely concerned (...) with regard to the consequences of the targeted killing of Hamas leader Sheikh Ahmed Yassin and six other Palestinians in Gaza yesterday. Germany, along with the European Union, has always strongly opposed extrajudicial killings” (UN Doc S/PV.4929 2004). When the term ‘targeted killing’ as well as ‘targeted attack’ or ‘targeted operation’ are invoked at the UN Security Council, they are often adopted in this invocation of condemning violence against groups of civilians, such as journalists, government officials or ethnic groups who are targeted by terrorist groups or authoritarian governments. Within this invocation of using ‘targeted killing’, the term expresses the same unlawfulness as the term assassination (Gross 2006b). Some state representatives have even used hybrid terms, such as “targeted assassinations” as Iran put it (UN Doc S/PV.5411 2006).

Assassinations or the killing of specific individuals for political purposes on foreign territory have been prohibited in international law outside of armed conflicts and seen to constitute a criminal offence of political murder and an act of aggression in international law (Schmitt, 1992: 627). As the US district court held in *Letelier v. Republic of Chile*, assassination “is clearly contrary to the precepts of humanity as recognized in both national and international law” (United States District Court 1980 para 5(A)). Assassinations and assassination attempts did take place, especially during the Cold War. Various attempts were, for example, conducted to assassinate Fidel Castro, involving a vast array of equipment such as cigars treated with

botulinum toxin, poison pills for his drink, a pen rigged with a hypodermic needle and an exotic seashell which was supposed to explode as Castro, a dedicated diver, swam over it (US Senate Select Committee, 1975: 71–100). As these plots indicate, however, the term was normally used to describe clandestine acts which were not admitted to officially.

In contrast, the term ‘targeted killing’ has been used to *officially acknowledge* and to justify killings, most notably in the context of armed drone attacks (Barack Obama 2013). This claim to lawfulness, or, as UN Special Rapporteur Alston puts it, the use of lethal force while “acting under colour of law” (UN Doc A/HRC/14/24, 2010: 3), seems different to the use of the term assassination (Wilner 2010, 310). In fact, the perceived lawfulness has precisely been invoked by some legal scholars in order to explain the use of the term ‘targeted killing’ as opposed to ‘assassination’: “under no circumstances should assassination be defined to include any lawful homicide. Now in the instance of a known terrorist, a covert targeted killing of the terrorist would not likely be considered an assassination because (...) there is a strong case for classifying the killing as one in self-defence, which makes the killing a lawful act” (Godfrey 2003, 493).

Yet, it is more complicated than just saying that assassinations are now claimed to be lawful under cover of the new term ‘targeted killing’ – because the term has also been utilised to describe (and justify) practices and claims which are distinct to the use of the term ‘assassination’, such as attacks by military forces using missiles in strikes directed against combatants within traditional armed conflicts (Brookman-Byrne 2017). The term ‘targeted killing’ in this invocation is precisely used in order to differentiate “between the assassination of non-combatants and the

targeting of combatants” (Wilner 2010, 311). In justifications of military use of force, the term is adopted *in order to* emphasise the precision of attacks in their compliance with the laws of armed conflict, concomitantly with terms such as proportionality and distinction within armed conflicts. The logic of the laws of armed conflict has thus been folded into the concept ‘targeted killing’.

This is how ‘targeted killing’ has lost its association with its terminological siblings ‘assassination’ or ‘extrajudicial execution’. UN Special Rapporteur Alston touches upon this in his report on ‘targeted killing’ when he says that “although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal. This is in contrast to other terms with which ‘targeted killing’ has sometimes been interchangeably used, such as ‘extrajudicial execution’, ‘summary execution’, and ‘assassination’, all of which are, by definition, illegal.”(UN Doc A/HRC/14/24/Add.6 2010b). ‘Targeted killing’ is thus not unlawful per se, because the term is applied through a different invocation which indicates compliance with existing legal frameworks. Using and interpreting the term ‘targeted killing’ within traditional frameworks for armed conflict can, however, in turn not entirely eradicate the other connotations of the term. The concept ‘targeted killing’ has thus also been discursively situated as a new category *outside* of zones of armed conflict as part of a massive surveillance system in a global non-international armed conflict (EU Committee Report, 2015: 10).

The different invocations of ‘targeted killing’ are important because they build on discrepant understandings not just of what kinds of claims and practices the term ‘targeted killing’ does (or should) describe, but of the political and legal world within which the term is embedded more

generally. Wittgenstein calls this the ‘way of life’ or ‘lifeform’ [Lebensform] which is for him intimately connected to the use of language (Wittgenstein 1960, 19). Based on this, fundamental tensions appear in the case of ‘targeted killing’ not just because the term is *defined* differently, but because the different uses of the term contradict each other regarding the legal lifeform they are situated in. The first and second invocation have completely opposed definitions of the term ‘targeted killing’ (denoting a lawful armed attack against combatants versus an unlawful killing of civilians) but they move within a similar legal understanding of international law regulations of the use of force. The third invocation, however, works within an entirely disparate understanding of what should or does constitute an armed conflict.

Adopting the term ‘targeted killing’ in order to describe a new category of state violence, thus invokes a blurred line between military use of force and law enforcement where decisions about strikes “will be informed by a broad analysis of an intended target’s current and past role in plots” (The White House 2013). The term ‘targeted killing’ is here understood to designate a use of military force which does not adhere to a traditional notion of geographical circumscription of armed conflicts. The killing of victims is seen as separate from the question of state sovereignty and divorced from the existence of an armed conflict (Anderson, 2009: 21; Solomon, 2010). This is what has led Chamayou to describe ‘targeted killing’ provocatively as part of a global hunting ground which would authorize “charging after the prey wherever it found refuge” (2015: 53).

Responding to this invocation of the concept, one can draw parallels between ‘targeted killing’ regimes and colonial ‘police bombing’ practices and advance a chilling critique of ‘targeted killing’, which

describes the systematic subjection of former colonial territories to bombing (Chamayou 2015b; Neocleous 2013; Lindqvist and Rugg 2003). One can argue in a legal way that such claims have been rejected and are in contradiction to the UN Charter (O’Connell 2010) and that “the targeted killings policy is totally illegal and contradictory to international law” (see the Petitioner’s Argument in Israeli Supreme Court Judgement HCJ 769/02 2006 para 3). Yet, it is difficult to maintain the argument that ‘targeted killing’ is unlawful *per se*, because the term has also been used to emphasise that practices are rigorously following international law requirements.

When the concept ‘targeted killing’ is invoked, it becomes thus unclear what is being discussed and within which legal framework – or which understanding of legal frameworks. Particularly the US government in its justifications of armed drone attacks has oscillated between different invocations of the term ‘targeted killing’ (See for example Harold Koh, Department Of State 2010)⁹, thus using the traditional legitimacy of IHL to justify the lawfulness of practices called ‘targeted killing’ – both in order to stress precision within traditional armed conflicts and in order to designate a new category of state conduct. While this might simply be “based on a misconception about the legal frameworks that apply outside of armed conflict” (Joint Committee on Human Rights, 2016: 8), it has led to confusion regarding how to oppose and critique some of these practices and claims. While, for instance, the HRC Resolution ‘Ensuring use of remotely piloted aircraft or armed drones’ (UN Doc A/HRC/25/22), was adopted by the member states with a majority of 27 to 6, some of the abstaining and opposing state

⁹ See for a similar critique of how the US government has blurred the armed conflict and self-defence justifications in official statements (Blank 2012)

representatives argued that the task of the Council was not to investigate specific weapon systems (See for example France, India and the USA, in: UN HRC News and Events 2014). Indeed, the very discussion of armed drone attacks at the forum of the Human Rights Council has been contested because the US has justified all armed drone attacks as taking place within the legal framework of IHL, not human rights law (see UN HRC News and Events 2014), a point I will return to in the next Chapter.

Building on Wittgenstein's understanding of language shows that the search for the true meaning of a term or the advancement of a definition which draws borders around the ways in which a term should be used, misses how a concept gains its uniqueness precisely through the layers of different uses, which can be contradictory but share family resemblances (Wittgenstein 1960, 66; see also Doty 1993, 303). For the term 'targeted killing' this is important, because it is the multi-layered use of the term across the three converse invocations which has differentiated the concept from more traditional terms (such as assassination) and has thus imbued the concept with a peculiar novelty and a legal relevance – as something not clearly breaking, nor clearly complying with international law. The last section suggested that this use of the term has to be understood through how the concept has been intricately connected to the linguistic representation of armed drones in word-word relations (Pin-Fat 2000, 664), which has led to discussions of armed drone attacks in all three invocations to apply the same term 'targeted killing'. This multi-layered use has important discursive effects in current international law discussions of counterterrorism practices.

The novelty distances the more contentious claims of 'targeted killing' from colonial practices such as 'police bombing' which, as discussed

above, rested on similar legal claims, as well as from more traditional concepts such as ‘assassination’. This distancing effect is relevant in the normative struggles around a changing right to self-defence because it imbues the prompt with a potential for changing existing international law provisions, which it would not otherwise have. Calling an attack ‘targeted killing’ rather than ‘assassination’ or even ‘police bombing’ also fulfils a normative function since labels such as ‘police bombing’ or ‘assassination’ carry historical connotations of unlawfulness and illegitimacy (Krasmann 2012; Grayson 2012). As I showed above, particularly the concept ‘police bombing’ built on and reproduced a hierarchical system of international law which formally discriminated between civilised and ‘savage’ states. The novelty with which the concept ‘targeted killing’ has been imbued, conceals the conceptual parallel to colonial aerial bombings. It might thus also lead to an underestimation regarding what is at stake in recent attempts to promote the lawfulness of ‘targeted killing’ outside of traditional armed conflicts in areas of the world where state authorities have been deemed ‘unable or unwilling’.

4.3. Conclusion

This Chapter has examined the discursive practices through which the ‘material reality’ of acts such as armed drone attacks is grasped. I investigated how ‘targeted killing’ can work as a new, legally relevant prompt which raises an expectation of speech. Building on Wittgenstein’s understanding of language, I analysed the concept not through a definition but through the different functions the term ‘targeted killing’ has played (i) in order to *justify* state violence according

to IHL, (ii) as a means to highlight that particular acts of violence are intentionally *breaking* international law requirements; and (iii) in order to represent a *new* kind of use of force which blurs existing armed conflict/policing frameworks.

I argued that within each of these invocations, the term could be substituted with other, more traditional terms such as ‘proportional use of force’, ‘assassination’ or ‘police bombing’ respectively. I suggested that ‘targeted killing’ can work as a new prompt, however, through the way current discourses have used the term *across* the three converse invocations. This stems at least partly from the way the term has been discursively linked to the new technology of armed drones, to a point where any attack conducted with an armed drone might be discussed using the term ‘targeted killing’. By being applied across the different invocations, ‘targeted killing’ has lost its association with its older terminological siblings (such as assassination) and has gained a legal relevance (in the sense of potentially changing existing international law) it would not otherwise have. Theorising customary international law as a language game, the Chapter thus showed that the brutality of turning fact into law already resides in *how* facts can come to be understood as facts.

The peculiar novelty of the concept is important because it obscures the history of similar claims and purports a new practice which has established itself only after 2001 – a new, legally relevant prompt which has raised an expectation to speak. The next Chapter examines how the novelty supposition thus sets the language game of customary international law up through the modality of evidence, within which silence already appears as potential acquiescence to a pre-configured prompt. As this Chapter demonstrated, the novelty supposition is not

determined by legal principles or any inherent material reality underlying the practices and claims of ‘targeted killing’. This indicates that there are other ways of engaging with recent counterterrorism practices. The next Chapter shows that other modalities are not only possible but have already been at work within the language game of customary international law regarding the interpretation of the right to self-defence. They are overlooked however – or cannot be made sense of – if we remain within the analytical gaze of only one modality.

“ I have nothing to say
and I’m saying it and that is
poetry as I need it .”¹⁰

¹⁰ John Cage ‘Lecture on Nothing’, printed in Cage (1959) *Silence*, p. 109

Chapter V

Games of Silence

In 2013, Ben Emmerson, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, advanced “a number of legal questions on which there is currently no clear international consensus” (UN Doc A/68/389; para 79) around the use of armed drones in counterterrorism measures. Almost all of these questions revolve around the interpretation of the right to self-defence which US claims and practices have been seen to raise (UN Doc A/68/389). Emmerson requested clarifications from states in the UN General Assembly and “urges all States to respond as comprehensively as possible” (UN Doc A/68/389; para 79). Four years later in his report in 2017 he states that “no formal answers have been received to date” (UN Doc A/HRC/34/61).

Chapter III investigated the assumptions necessary for silence to work as acquiescence in customary international law. I challenged the understanding that “silence is, first, a fact and a verbal omission” (Starski 2017, 22). Through different speech expectations and

assumptions of relevance, silences will be interpreted differently and might not be noted at all. Those who are often considered to observe state acts as if from the outside (e.g. scholars, journalists, courts) thus directly participate in re-producing assumptions and creating discursive facts which are turned into law. Showing the silencing dynamics of this process, which contributes to further marginalise some voices, my point was not to argue that silence should never be invoked as acquiescence, but rather that this invocation is contingent on particular assumptions.

For silence to *become* communicative, the perception of a new prompt which is considered legally relevant must, for example, be presupposed – in order for any expectation of speech to arise. Chapter IV scrutinized the discursive formation of the prompt in the case of ‘targeted killing’ in a diachronic analysis. Showing the historical continuities of similar forms of ‘police bombing’, I argued that there is no inherent novelty or legal relevance in ‘targeted killing’ practices and claims. The process of delineating the prompt within complex configurations of possibilities in a particular way (e.g. armed drone attacks as an expression of a new, legally relevant prompt which raises an expectation of speech) is not self-evident. It does, however, have powerful effects in the language game of customary international law.

Investigating how silence can operate as potential evidence, the last two Chapters have showed forms of exclusion within the processes of international law formation which might be indicative of international law more generally; such as forms of not listening to some actors (e.g. the Non Aligned Movement), while invoking silence of others (e.g. the Security Council); or forms of ignoring the (post-)colonial continuities of state practices while invoking their novelty based on how they appear within dominant Western representations (e.g. through the novelty of

the drone technology). When silence is invoked as absence of protest, seemingly self-evident delineations of the context are already presupposed.

This Chapter returns to unpack the alternative functions silence can have in customary international law. As argued in Chapter II and III, silence can work to ignore an issue for it not to acquire legal relevance and silence can be a diplomatic move of keeping the question of un/lawfulness open. Engaging with the alternative functions of silence, this Chapter shows how the language game of customary international law not only can, but already *has* been at work through different modalities in the case of ‘targeted killing’ debates; different modalities not just in the sense that more diverse interests or voices are involved in the debates than an invocation of silence as acquiescence would suggest, but in the sense that the issue has been approached through a fundamentally disparate set of implicit assumptions. Silences, such as the non-responses to Emmerson’s request at the General Assembly, can then be understood to take on radically different functions. Theorising customary international law as a language game reveals layers of contestations, which cannot be grasped if customary international law is only analysed as a question of evidence regarding a pre-supposed prompt.

The Chapter thus contributes to develop a more layered and decentralized reading of customary international law as a language game; decentralised in two ways: in that contestations of many governments often take place not in terms already determined; instead they often seem to precisely be *about* the terms through which to approach an issue. Second, more decentralised in that interpretive struggles within the language game of customary international law are

sometimes shaped by assumptions (such as the supposition of novelty introduced in the previous Chapter) which are not based on legal principles or determined by an inherent, material reality, but are (re-)produced in dispersed discursive practices (e.g. scholarship, media discourses, NGO reports, etc.). This also points to spaces for agency and reveals those aspects “amenable to political action” (Orford 2012, 622).

The Chapter contains three parts. The first part highlights the contingency of approaching ‘targeted killing’ through the modality of evidence in which silence appears as lack of objection in relation to a preconfigured prompt. I build on the diachronic analysis of the previous Chapter to show the effects of representing ‘targeted killing’ as something new and the central role of this common-sense assumption in setting up the language game of customary international law through the modality of evidence. I argue that the novelty supposition creates a discursive break which obscures the historical struggles around similar claims and practices. It presents a world in which existing legal frameworks are already *presumed* to be inadequate and accounts for some methodological choices (such as the focus on post-2001 cases) through which silence can be invoked. Focusing on the novelty supposition as a ‘banal’ supposition, banal in the sense that it is not dictated by any legal principles and is often not explicitly discussed at all, directs attention to those aspects within the language game of customary international law which could be otherwise. This then opens analytical space to show how the language game of customary international law can and has been at work through alternative modalities.

The second part of the Chapter presents a different modality and demonstrates how it has been at work in parallel to the modality of

evidence. I thus examine discussions around a developing un/lawfulness of ‘targeted killing’ through the modality of status quo, which is based on the assumption of non-change. This reveals quiet forms of contestation taking place at the inter-state level, such as the systematic avoidance of the term ‘targeted killing’ by most governments, who instead rely on more traditional terms such as ‘assassination’ or ‘extrajudicial execution’. I discuss how silence can function as a way of ignoring an issue and disregarding a prompt. Rather than taking the assumptions of the modality of evidence as self-evident, analysing them as only one modality of the language game of customary international law thus reveals lines of contestation regarding the very assumptions through which an issue is debated – or not debated.

The last part of the Chapter submits a third modality and argues that analysing customary international as a language game reveals power struggles not only regarding the development of particular claims (e.g. ‘targeted killing’), but regarding the more fundamental rules of the language game of customary international law. I thus examine debates on recent counterterrorism practices through the modality of context, in which the expectation of speech does not rely on the novelty of the prompt, but is situated within a complicated, political context. This reveals more indirect struggles around the un/lawfulness of ‘targeted killing’ at the inter-state system, such as the discussion of armed drone attacks at the Human Rights Council – despite objections to this by the US government. The modality of context is constituted through a lower speech expectation which is always linked to the question of voice in a particular context. Posed more radically, this opens the door to subvert one of the most fundamental rules of the current language game of customary international law: That it is states who speak.

5.1. Setting Up For Change

Chapter II developed four parameters of communicative silence: The prompt which is not reacted to, the assumption of relevance, the disappointed expectation of speech and the perceived deliberateness of silence. As unpacked in the previous Chapters, silence can work as acquiescence if a high speech expectation is maintained (perhaps despite inabilities to speak) and if there is an assumption of a new, legally relevant prompt. The previous Chapter argued that the supposition of novelty in the case of ‘targeted killing’ is not self-evident. I investigated the historical continuities of practices and claims throughout the last century and showed that ‘targeted killing’ practices and claims, as well as reactions to them, have a long legacy. The framing of practices, such as armed drone attacks, as a new, legally relevant prompt of ‘targeted killing’ is thus not dictated by the nature of any inherent material reality.

The point of this problematization in the previous Chapter was not to argue that ‘targeted killing’ is nothing new at all, that it is not legally relevant and should not be raising an expectation of speech; rather the point of the diachronic analysis of the previous Chapter was to show that this delineation of ‘targeted killing’ is only *one* way of engaging with the question of un/lawfulness of such practices. This section shows the important role of the supposition of novelty in setting debates on a changing un/lawfulness of ‘targeted killing’ up through the modality of evidence, in order to highlight the contingency and space for agency regarding particular ways of engaging in the language game of customary international law.

The previous Chapter demonstrated how the use of the new term ‘targeted killing’ distances the concept from colonial practices such as ‘police bombing’ which, as discussed above, rested on similar legal claims, as well as from concepts such as ‘assassination’. This distancing effect is relevant in the normative struggles around a changing right to self-defence because it influences how armed drone attacks are perceived, not just in the sense that they are perceived as more legitimate than the term ‘assassination’ would connote (Krasmann 2012; Grayson 2012), but in that they are perceived to be something new. As discussed in Chapter III, legal inquiries into the un/lawfulness of ‘targeted killing’ (and similar claims of changes to the right to self-defence) often focus on a chain of cases after 2001. Through this analytical focus, counterterrorism cases appear legally relevant through the way in which they are linked to other post-2001 cases, thus indicating not an individual political act but a general, legally relevant *trend*. Methodologically, the selection of cases after 2001 already presumes the change it ventures to investigate.

Most of the counterterrorism cases discussed in Chapter III are embedded in complex historical trajectories (see for example, regarding the Russian interventions in Georgia and the Turkish interventions in Iraq Campana and Légaré 2010, 51; Antonopoulos 1996, 49; Ruys 2008, 346). As the previous Chapter discussed, there is also a long history of similar discussions on the un/lawfulness of small-scale aerial bombing of insurgents and terrorists on foreign territory, such as the French bombardment of terrorists on Tunisian territory in 1958 (UN Doc S/3954 1958), or the South African justification of killing insurgents in Zambia in 1976 (UNYB 1976, 164). Because most of these practices were condemned as acts of aggression (UN Doc S/RES/393 1976; UN

Doc S/RES/273 1969), not just the continuities of the practices and claims themselves but the history of condemnation of such practices is obfuscated by the novelty supposition.

The methodological focus on post-2001 cases also masks the track record, particularly of the US and Israeli governments, to push for a more extensive right to pre-emptive self-defence against non-state actors. The US aerial bombing of suspected terrorist targets in Libya 1986 was thus justified with the right to self-defence against terrorists in countries which provided harbour for terrorists to train in (UN Doc S/PV.2674 1986). The Israeli attack in Jordan 1968 was justified as preventive self-defence against terrorist training centres (UN Doc S/8486) and the 1978 bombardment of Lebanon was justified with the right to self-defence to clear PLO from southern Lebanon where “an absence of law and order reigned” (UNYB 1978, 297). The 1993 attacks in Iraq, as well as the 1998 missile attacks by the US government in Sudan and Afghanistan, were justified along similar lines as targeted measures of self-defence against terrorist suspects who it was claimed had taken refuge in the respective countries (see UNYB 1998, 185; see also Lobel 1999b). These practices and claims were mostly condemned as unlawful use of force and as acts of aggression (UN Doc S/RES/248 1968; UN Doc S/RES/425 1978; UN Doc A/RES/41/38 1986). The novelty supposition obscures these continuities as well as the long history of opposition to this form of military violence. It provides a discursive break with claims and practices which were unsuccessfully advanced over decades and thus promotes the understanding of a changed interpretation of the right to self-defence which has been argued to form “instant custom” after the terrorist attacks of 9/11 (Langille 2003b).

Given the nature of customary international law, which gains lawfulness slowly and over long periods of time, it seems surprising that proponents of ‘targeted killing’ tend to focus on post-2001 cases of state practice when arguing for a developing lawfulness of the concept (see for example Anderson 2009; Plaw and Reis 2016). This might be partly explained through how the assumption of international law *having* changed in the 21st century is often linked to the assumption of the legal framework *needing* to change. Both supporters and critics of armed drone attacks have hence called for international law regulations to address the practices because “as the world faces the grey area between terrorism and war, there needs to be a new international consensus on when it is acceptable for a state to take a life outside of armed conflict” (UK Government 2015, 75; see also European Committee of the Council of Europe 2015; Reinold 2011). This is often based on the notion that “military defensive reactions to attacks committed only by non-state actors were not excluded [from preparatory works of the UN Charter]. They were simply not envisaged at the time the legal texts were drafted” (Van Steenberghe 2010, 198).

The implication that existing legal frameworks are inadequate is often linked to the idea that ‘targeted killing’ and similar counterterrorism practices and claims are responses to a geo-political environment which has changed through the new threat of transnational terrorism and the invention of new technologies, leading, as the British Human Rights Committee report on ‘targeted killing’ puts it, to “a situation for which our long established legal frameworks were not designed” (Joint Committee on Human Rights, 2016: 18). The idea that existing international law does not adequately address current deployment of military weapons on foreign territory has itself been contested

(O’Connell 2010; Gray 2008; Corten 2010). The supposition of change (through which only cases after 2001 are investigated in the first place) implies this inadequacy as self-evident however – and thus places it beyond discussion.

The novelty supposition also has effects regarding the methodological choice of cases. The focus only on cases after 2001 neglects to examine, for example, the historical continuity of silence on US practices at the Security Council. As the discussion in the previous Chapter indicated, condemnations regarding US counterterrorism uses of force have been less common at the Security Council since after the end of the Cold War. Protest has persisted outside of the Security Council, however and objections have also been raised at the Security Council regarding similar practices and claims by actors other than the US. If only practices and reactions after 2001 are investigated, the legacy and political context of this silence is obliterated. This matters because silence has precisely been invoked, as discussed in Chapter III, as a shift in *opinio juris*, as a changing legal stance of states regarding counterterrorism uses of force in self-defence after 2001. This is the story of acquiescence from the perspective of the modality of evidence. The story is immediately called into question when a more historical perspective is assumed.

A focus on cases after 2001 also neglects to analyse the continuities in *how* protest to counterterrorism uses of force is voiced. There is a long tradition of governments focusing on questions of proportionality instead of an open doctrinal dispute on self-defence at the Security Council (Gray 2008, 166). Neglecting these historical continuities, might raise an expectation of speech directly on questions of self-defence. While, for example, most states condemned the Israeli attacks in 2003

and 2006 in the ensuing Security Council debates (UN Doc S/PV. 4836), this has by some interpreters still been read as acquiescence to a wide right of targeted self-defence against terrorists since "none of the delegations making presentations before the Security Council specifically addressed the legality of defensive force specifically targeting terrorist bases in a third State" (Trapp 2007, 153; see also Plaw and Reis 2016, 239). This particular silence "specifically addresse[ing] the legality of defensive force" (Trapp 2007; 153) only disappoints an expectation of speech if one does not take the historical context of Security Council debates into account.

The novelty supposition around 'targeted killing' and similar counterterrorism claims and practices has thus had important effects in debates on a potentially developing un/lawfulness of such practices. It has created an apparent discursive break with legal claims and practices before 2001, reproducing the assumption of a world which is politically changing and should be legally changing. It has imbued practices, such as armed drone attacks, with legal relevance by distancing them from more traditional concepts, such as 'assassination in self-defence' and has created an expectation for governments to react to this prompt. It has also advanced a decontextualized and ahistorical reading of what speech can be expected on and at which forum. Chapter III has showed that the invocation of silence as acquiescence often relies on deeply ingrained hegemonic assumptions, such as discounting protest by the Non Aligned Movement while noting silence at the Security Council. Building on the diachronic analysis of the previous Chapter, this section showed how it also relies quite importantly on the banal supposition of novelty.

Focusing on the more banal supposition of novelty which is not exclusive to the legal field but which could be otherwise highlights the importance of diverse actors (such as journalists, NGOs, scholars) within the language game of customary international law, who might or might not (re-)produce these assumptions within discourses on state violence. It thus also indicates space for agency in the language game of customary international law. This section has drawn on the contingency of the novelty supposition and its effects on the language game of customary international law in order to open up for thinking about different modalities. The next section engages with the modality of status quo, while the final section, by unpacking a third modality will open up to a re-reading of customary international law more generally.

5.2. Building On the Past

As discussed in the previous section, the novelty supposition frames the language game of customary international law through the modality of evidence, within which legal and political change is presupposed and state acts, such as armed drone attacks, are already conceptualised as a legally relevant prompt for reaction. This is how silence can work as acquiescence. Showing the contingency of this set of assumptions opened up for an analysis of different modalities. This section presents the *modality of status quo* and shows how it has been at work in customary international law debates on armed drone attacks and similar counterterrorism uses of force. Not assuming legal relevance of a prompt (relevance in the sense of challenging existing legal principles), the modality of status quo stays square within existing legal frameworks. This is how, as discussed in Chapter II and III, silence can work as

confirmation of the status quo, as a way of ignoring and disregarding claims – precisely by them *not* being (re-)produced as legally relevant. The section thus reveals quiet contestations which are precisely about the terms and parameters of the language game of customary international law – and whether, for example, the concept ‘targeted killing’ should be used at all.

5.2.1. Responding to What?

Silence is non-directional (unless the silent speaker frames it beforehand: ‘Regarding X I will not say anything to you’). While the direction of silence can be presumed when someone in a dialogue is silent after you asked a question, this presumption breaks down in larger discursive situations. Hence, while state silence is often assumed to be a reaction to a practice and/or claim, the simple equation of practice+no reaction=acquiescence is built on contestable assumptions and expectations – as the previous Chapters have discussed. Any particular state practice (such as an armed drone attack) can be seen as advancing a number of different legal categories or claims – or none at all and instead be regarded as a political act, or not be noted at all. To which – if any – does silence respond to?

Because of the difficulty which non-directionality of silence poses for the doctrine of acquiescence, state silence is usually investigated in an intersecting way in international law scholarship (see for example Reinold 2011; Ruys 2008). Acts of protest could be stretched over different cases and the task of scholars is to find the ‘residuum’ of general claims which are not objected to (MacGibbon 1954, 119). The individual case is thus linked into a chain of cases which demonstrates

that legal relevance of the prompt is wider than just one state practice but also that silence stretches beyond the political circumstances of one case. Yet, this understanding of silence as the ‘residuum’ of protest does not ultimately solve the problem which the non-directionality of silence poses. In the end, any discussion of silence as acquiescence takes it as given that silence is indeed a response to new, relevant act(s) and by implication performs the novelty and relevance of these cases.

In the case of ‘targeted killing’ the novelty supposition, as discussed in the previous Chapter, is re-produced in how the concept has been linked to the drone technology as a prompt which is challenging existing legal provisions. If the claims and practices are instead approached through existing legal provisions and nothing is seen to “call for a response” (International Court of Justice 2008), silence gains a different function – as confirmation of the status quo. This is how we can analytically grasp a fundamentally different set of assumptions, a different modality of the language game of customary international law. As discussed in Chapter II, silence can be the most effective way of communicating disregard and ignoring an issue. In what I called the modality of status quo, not speaking about an issue, not deliberating it as potential change can work against a change manifesting.

Analysing customary international law as a language game in which different modalities exist in parallel then shows some contestations and fundamental struggles regarding the modality through which ‘targeted killing’ has been discussed – for example by questioning or rejecting that it should be discussed at all. A number of state representatives have thus rejected the notion that the new technology and deployment of armed drones is legally relevant and have framed their silence on armed drone attacks as confirmation of the status quo. The Committee of Ministers

of the Council of Europe, which is comprised of the Foreign Affairs Ministers of 47 member states, thus explicitly explains why “it does not find that there is a need at the present stage to draft guidelines along the lines suggested by the Assembly” regarding armed drone attacks (Committee of Ministers 2015, Doc 13928, Reply to Recommendation 2069; para 10). While the Committee notes that “the use of armed drones is relatively recent and has greatly increased in the past years, [it] also notes that there is a broad agreement that armed drones themselves are not illegal weapons and that relevant rules of international law regulating the use of force and the conduct of hostilities as well as of international human rights law apply to their use” (Committee of Ministers 2015, Doc 13928, Reply to Recommendation 2069; para 2). While responding to the prompt, they thus argue that there is no need to discuss ‘targeted killing’ because existing legal frameworks are sufficient to regulate the new drone technology. This seems to be a point coming up frequently when state representatives have discussed armed drone attacks. Within the UN HRC panel discussion on armed drones, for example, state delegations emphasised repeatedly the sufficiency of existing international law and the conclusion of the discussion was to affirm that “the existing legal framework was sufficient and did not need to be adapted to the use of drones” (UN Doc A/HRC/28/38; para 56).

Explicitly framing silence as confirmation of the status quo, the above cited passages move within a different modality of the language game of customary international law. Based on the assumption that armed drone attacks are not a legally relevant prompt within the language game of customary international law (relevant in the sense of challenging existing frameworks), silence is understood to express disregard and

confirm that “the existing legal framework was sufficient” (UN Doc A/HRC/28/38; para 56). I am not arguing that the ‘actual intentions’ of the governments cited above is indeed to maintain status quo regarding the right to self-defence. What I want to highlight, rather, is the fundamentally different trajectory in which practices like armed drone attacks are set up when explicitly or implicitly *not* framed as a legal novelty and potential change – and silence is understood as confirmation of the status quo. The possibility of silence working as a strategy to ignore claims like ‘targeted killing’ is not grasped when customary international law is understood exclusively through the modality of evidence, thus analytically missing fundamental contestations which take place about the terms and assumptions through which an issue should be approached. This is not just an analytical problem, since independent of the ‘actual intentions’ of state representatives, the *function* of silence is always shaped through the assumptions of those who invoke and interpret silence.

Because the contentious ways in which the concept ‘targeted killing’ has been used is stretching existing international law categories, it is essential whether attacks are framed as legally relevant and discussed on the legal stage at all. This is why Susanne Krasmann calls attention to the co-constitutive relationship between the discourse on ‘targeted killing’ and its law: “Legal reasoning, however, couching the practice in legal terms and producing a normative reality of its own, contributes to targeted killing’s legalization” (Krasmann 2012, 668). Building on Krasmann’s argument regarding the productive function of the discourse on ‘targeted killing’, silence can then be understood as the most effective way of preventing ‘targeted killing’ from gaining traction within the language game of customary international law, as a way of

ignoring the prompt by staying square within the modality of status quo. The next section expands on how silence regarding the term ‘targeted killing’ has thus been mobilised.

5.2.2. Quiet Struggles

Emphasising the distinction between the legal frameworks within and outside of armed conflicts, UN Special Rapporteur Emmerson states in a 2013 report on armed drone attacks that “the threshold question therefore is not whether a killing is targeted, but whether it takes place within or outside a situation of armed conflict” (UN Doc A/68/389 2013 para 24). He goes on to explicitly point out that “the Special Rapporteur does not use the expression ‘targeted killing’ herein” (UN Doc A/68/389 2013 para 24). Before the context of the previous Chapter, this explicit omission of the term ‘targeted killing’ in the above cited report is relevant. The diachronic analysis in Chapter IV suggested that the multi-layered use of the term ‘targeted killing’ blurs existing legal categories and invokes a sense of novelty, which delineates the language game of customary international law along the lines of the modality of evidence. As Wittgenstein argued, it is through speaking a word out loud that we give it a role in a language game (Wittgenstein 1960, 50).

When governments have discussed ‘targeted killing’ claims, it is thus important to highlight that they have avoided using the term ‘targeted killing’ altogether. When the Israeli government publicly confirmed the practice of ‘targeted killing’ under government orders in 2000, this was met with strong opposition of other governments in the following years (see the reaction by various states in the 4945th meeting of the Security

Council UN Doc S/PV.4945 2004). The EU Council condemned such extra-judicial killings by Israel in the Occupied Palestinian Territories (Council of the European Union 2004, 2572nd Council Meeting). The Spanish representative called on Israel to avoid “disproportionate actions, including extrajudicial executions” (UN Doc S/PV.4945 2004), the Chinese delegation “strongly condemns this violation of international law and [calls] upon Israel to immediately cease such assassination operations” (UN Doc S/PV.4945 2004), the British representative stated that “the United Kingdom condemns extrajudicial killings” (UN Doc S/PV.4945 2004) and the Permanent Observer of the League of Arab States asks the Security Council to force Israel to cease “its policy of extrajudicial executions” (UN Doc S/PV.4945 2004). What is important to note is that the state representatives who voiced these condemnations did not only reject the proposed claims and practices; they avoided the term ‘targeted killing’ altogether.

The omission of the term ‘targeted killing’ constitutes a more general pattern within the Security Council debates I analysed. During the 2006 debate of Israeli ‘targeted killing’ practices and claims, most governments again tend to use the terms ‘extrajudicial execution’ and ‘assassination’, as for example the speaker for the European Union who “called on Israel to stop the practice of extrajudicial killings, which was contrary to international law” (UN Doc S/PV.5411 2006) or a hybrid term such as “extrajudicial targeted killing” (UN Doc S/PV.5411 2006). In over 900 Security Council debates I investigated between 2000 and 2016, the term ‘targeted killing’ was only used 23 times by state representatives - compared to the terms ‘extrajudicial execution’ and ‘assassination’ which were used in 167 statements by governments

during the same time frame in order to refer to ‘targeted killing’ claims and practices of the Israeli government.

This avoidance of the term ‘targeted killing’ shows a quiet contestation which operates at a more implicit level than the protest itself does. Silence on the very concept ‘targeted killing’ indicates a refusal to play the game according the parameters of the modality of evidence. Investigating customary international law as a language game in which different modalities are at work in parallel here reveals the significance of struggles which are not understood as struggles if we only analyse from within one modality. While governments have hence often been perceived not to be positioning themselves towards ‘targeted killing’ claims and practices (see for example the interpretations discussed in Chapter III), the above analysis indicates that governments are already positioning themselves, but in ways which do not lie within the parameters of the modality of evidence – they are rather precisely *about* these parameters (e.g. whether ‘targeted killing’ is – or should be – a legally relevant prompt at all). These contestations cannot be made sense of from within the modality of evidence, where they appear as potential acquiescence.

Understanding silence in its function to disregard a prompt, also directs attention to the importance of other actors within the language game of customary international law, beyond a state-centric understanding. The very existence of the concept ‘targeted killing’ in the language game of customary international law seems to be mainly (re-)produced by media reports, scholarship, legal committee reports, etc. – not at the inter-state level. The avoidance of the term ‘targeted killing’ by governments is thus in contrast to the frequency with which the term ‘targeted killing’ has been used in other discourses, such as (Anglophone) IR and IL

scholarship. Google Scholar returns 306 social science articles between 2000 and 2016 which contain the exact term ‘targeted killing’ in the title of the article. English language media have similarly used the term ‘targeted killing’ in this way. An investigation of the British newspaper *Guardian*, for example, returns 62 articles with the exact phrase ‘targeted killing’ in either text or title, of which 52 are directly linked to armed drone attacks. While a more extensive research on media discourses is beyond the scope of this dissertation, these results further underline the importance of actors other than state representatives within the language game of customary international law. The question then becomes how we could trace this influence into the formation of laws; if customary international laws can ever be said to exist beyond their reproduction and invocation within the language game of customary international law.

Rather than approaching the debates on a potentially developing un/lawfulness of ‘targeted killing’ through the parameters of the modality of evidence, this section has showed contestations *about* these parameters. I demonstrated that governments have avoided using the concept ‘targeted killing’ altogether, that they have emphasised the adequacy of existing international law requirements and have framed silence to armed drone attacks as expressing that there is no necessity to respond. Building on the analytical framework developed in Chapter II, I demonstrated quiet contestations regarding current counterterrorism debates on the right to self-defence in which silences function to resist the proposed prompt, precisely by not invoking and reproducing it. Not arguing that these are the ‘true intentions’ for governments or other actors who are silent, I built on the above

Chapters which have showed how crucial the act of interpretation is for the function of silence.

This is important, because it shifts attention to the hermeneutical gaze of the modality one assumes, which often tends to self-evidently privilege the perspective of the powerful, excluding and silencing the assumptions and views of more marginalised actors (see for a discussion of this Chapter III and IV). In the case of discussions around the un/lawfulness of ‘targeted killing’, the modality of evidence thus lends legitimacy to practices, such as armed drone attacks, and supports claims of dominant actors towards a wider right to self-defence. This section showed how a different hermeneutical gaze radically shifts the practices which are noticed, the aspects focused on, how they are made sense of; and also changes that which is re-produced as relevant. The next section expands on this by analysing current debates on armed drone attacks and similar counterterrorism practices through a third modality, thus unpacking how customary international law understood as a language game raises the question of voice.

5.3. Staying Present

Conceptualising customary international law as a language game in which silence can gain different functions has drawn attention to how states and other actors may be moving within different sets of assumptions, which I analysed as different modalities. This section further advances a more layered reading of the language game of customary international law in the case of recent debates on armed drone attacks and similar practices. The section examines the modality

of context, within which silence works to leave the question of legality open. Silence, within the modality of context, is thus understood as an outcome of political pressure, as a diplomatic move, a way to post-pone a decision or create ambiguity. Silence can assume the function of leaving the question of legality open when state acts are understood as part of a complicated discursive context in which the question of (legal) deliberateness is not given. Silence is thus not absolute but situated in a particular context. While in the modality of evidence silence can operate as acquiescence by maintaining a high speech expectation – even when, as discussed in Chapter III, the deliberateness of silence is doubtful – the modality of context is based on a lower speech expectation in relation to the discursive situation.

I analyse this in two ways. First, within more traditional legal approaches to customary international law, the modality of context links the question of silence to the question of legal deliberateness. Expecting speech within a particular context or forum at which state non/acts take place, then shows more indirect ways of how governments have engaged in the language game of customary international law, for example by discussing armed drone attacks at the HRC while being silent at the Security Council. Second, this is also linked to the question of who is or should be expected to speak within the language game of customary international law more generally. The modality of context can then be seen to lead to a more profound challenge of current rules of the language game of customary international law, for example by including non-state actors into the debate on a wider right to self-defence. These openings can be analytically grasped through a theorisation of customary international law as a language game, which reflects on the assumptions and expectations beyond just one modality.

5.3.1. Political Struggles

If the expectation of speech is not maintained independent of the context but lowered in adjustment to the discursive circumstances of speech or non-speech, silence can function to leave the question of un/lawfulness open. Silence thus understood is crucial in international negotiations and diplomatic relations between states, for example in order to avoid ‘linguistic traps’ (Mattern 2005, 97; Johnstone 2003, 468). As discussed in Chapter III, within more doctrinal international law, speech expectations are lowered according to the context, if legal deliberateness is not presupposed. Because states are formally equal but politically unequal, the role of interpretation is by some understood to encompass taking care “to distinguish political or moral elements from the strictly legal ones” (Corten 2005, 817).

This section engages with discussions of armed drone attacks at the Human Rights Council as opposed to the Security Council and shows how states have thus opposed ‘targeted killing’ claims while avoiding to directly confront the US government. If the spoken word is dominated by hegemonic patterns silence can be a strategy of circumventing (Clair 1997; Montoya 2000). As Rosa Brooks put it in the context of US justifications of armed drone attacks, “states dismayed by new interpretations of once-fixed legal concepts can take a middle ground, quietly questioning new interpretations of the law while reaffirming their own interpretations” (Brooks 2014, 84). The very choice of the Human Rights Council as the forum to discuss armed drone attacks can then furthermore be understood as a form of contestation in itself,

implicitly opposing how the US government¹¹ has justified all armed drone attacks within International Humanitarian Law without directly condemning the claims they advanced.

In the modality of evidence, the discussion of US claims and practices, such as armed drone attacks, at the Human Rights Council – rather than the Security Council – would be interpreted as another example of how *Jus ad Bellum* concerns regarding ‘targeted killing’ claims have been avoided and potentially acquiesced to. Given the historical legacy of silence on US practices at the Security Council, discussed in Chapter IV, this understanding of silence relies on a decontextualized and ahistorical expectation of speech. Far from signalling legal intentionality, silence can become expressive of governments not being able to signal. As Lobel (1999, 557) argued, regarding the lack of objection to the US attacks in Afghanistan and Sudan in 1998, this silence did not indicate a legal position but expressed that “the United States has the power to block any effort to question or challenge its factual assertions”.

If silence is understood within a particular context, speech expectations are lower, particularly regarding the practices of powerful actors (Corten 2005). The tendency of governments to debate armed drone attacks in general and at the Human Rights Council – rather than to oppose US practices directly at the Security Council – can be understood as a way for states to voice their critique on ‘targeted killing’ without having to directly confront the US government. As the Pakistani representative, who introduced the resolution on armed drones at the UN Human Rights Council (UN Doc A/69/53 2014, 53) cautiously puts it: “The

¹¹ As well as a few other states, most notably Israel and – debatably – the United Kingdom. See for further discussion of this Chapter I

resolution did not refer to any specific country, and did not intend to name or shame anyone.” (UN HRC News and Events 2014).

Governments can be seen to engage in the language game of customary international law in more diverse ways than just a binary understanding of speech/absence of speech. The very discussion of armed drone attacks at the forum of the UN Human Rights Council, here touches on controversies around the parameters through which the un/lawfulness of ‘targeted killing’ should be discussed. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has argued that the lawfulness of the use of armed drones for ‘targeted killing’ depended above all on whether there was an armed conflict: “since under international *human rights* law, the targeting of individuals was rarely lawful” (UN Doc A/HRC/28/38; para 13; emphasis added). As was also summarised in the report on the 2014 penal discussion on armed drone attacks: “Many [state] delegations expressed concern that armed drones had been used outside the international legal framework. Some expressed specific concerns that drone strikes could amount to extrajudicial or arbitrary executions (...). It was recalled that outside armed conflict, the key international framework was international human rights law and some delegations recalled that international law prohibited arbitrary and extrajudicial executions (...)”(UN Doc A/HRC/28/38; para 37).

Other state representatives, however, have suggested to discuss armed drone attacks under the frameworks of IHL (UN Doc A/HRC/28/38; para 31). Indeed, explaining their vote against the resolution on armed drones in 2014, the UK argued that the HRC was not the appropriate forum because “when used in the context of armed conflict, the

appropriate law was international humanitarian law and the Human Rights Council did not have a mandate to consider this” (UN HRC News and Events 2014). Similarly, the US representative argued that “it did not believe that the examination of specific weapon systems fell under the mandate of the [Human Rights] Council” (UN HRC News and Events 2014).

The continuing discussion of armed drone attacks at the Human Rights Council can be seen, not only as a diplomatic way for governments to address the issue without directly opposing US claims at the Security Council, but also as a form of contestation in itself. Debates on armed drone attacks taking place through the HRC, with another resolution on the use of armed drones adopted by the Human Rights Council in 2015 (UN Doc A/70/53 2015), then implies that the main concerns state representatives and UN experts have expressed regarding the use of armed drones, is precisely about attacks taking place outside of traditional zones of armed conflict – in which case International Human Rights law is considered to be the applicable framework, not IHL (as the US and UK government has claimed).

Theorising customary international law as a language game thus shows more indirect political struggles. If speech and absence of speech are situated within a complicated, enfolding context, which influences expectations of speech, silence can function to leave the question of legality open and speech expectation is shifted to fora which might not otherwise be considered (e.g. the Human Rights Council). It also shows contestations regarding the parameters through which claims should be discussed in the first place, such as the discussion of armed drone attacks through the human rights framework rather than International

Humanitarian Law. Raising the question of the ability to speak, this different analytical gaze also opens space to question or even subvert the more fundamental rules of the language game of customary international law, a point which the next section explores.

5.3.2. The Question of Voice

Chapter III discussed the “brutality of the passage of fact into law” (Stern 2000, 93) and showed the silencing dynamics underlying the production of silence. This is hidden from view in a positivist approach which takes silence as a given fact and conceptualises interpretation as a form of observation from the outside. Yet, maintaining a high expectation of speech within an asymmetrical discursive context in which not everyone is able to speak (or is heard) is, I argued, political in itself and in the case of ‘targeted killing’ debates has privileged the analytical gaze of the powerful. Theorising customary international law as a language game, this section demonstrates how the exclusion of voice is not just a question of speech expectation regarding a particular situation but through this calls into question – or even subverts – the rules of the language game of customary international law more generally. I discuss how silence can and has been mobilised to open up the question of voice in the context of ‘targeted killing’ debates and show how actors other than states have been brought into the language game of customary international law. This links into Chimni’s recent critique of customary international law formation and his call for a new, “postmodern doctrine of customary international law” (B. S. Chimni 2018).

Silences in the case of ‘targeted killing’ express some fundamental exclusions within the language game of customary international law. People living in areas subjected to ‘targeted killing’ practices are not once but triply excluded from the language game of customary international law: First as non-state actors whose voices are regarded irrelevant for law-creation; second as people living within states whose governments’ objections are not given the same weight as Western states or are not even heard in many discourses debating the customary un/lawfulness of ‘targeted killing’ (as discussed in Chapter III); and third as people who live in marginalised regions, which might not be represented by their own governments; such as the Federal Administered Tribal Area in Pakistan, one of the regions, which is most heavily targeted by CIA strikes. The Federal Administered Tribal Area (FATA) in Pakistan has been construed as a buffer zone since British colonialism in 1849, administered by a special legal regime, called the Frontier Crimes Regulations (See for a more detailed discussion Akhter/ Shaw 2012) and the region has continued to be politically and legally marginalised within Pakistan (Amnesty International 2010). The government of Pakistan itself seems to have consented secretly to and collaborated with some of the armed drone attacks in the FATA region, leading to a judgement of the Peshawar High Court in Pakistan which sees the need to ask the Pakistani government to speak up and to “convey forcefully to the US in clear terms that no further drone strikes will be tolerated on its sovereign territory” (Peshawar High Court 2013; para i).

The problem regarding the question of voice in ‘targeted killing’ debates has been picked up by UN experts at the Human Rights Council. While, for example, state representatives who participated in the 2014 panel on

armed drone attacks emphasise the importance of state sovereignty and the necessity for “express consent of the State on whose territory force is deployed” (UN Doc A/HRC/28/38; para 34), UN experts at the panel emphasise adherence of armed drone attacks with International Human Rights law, even if governments have given consent to the use of force on their territory. They explicitly referred to the “specific obligations of a State on whose territory a drone strike had taken place, as a result of which there had been casualties, whether the State had consented to the use of drones on its territory or not” (UN Doc A/HRC/28/38; para 50). Similarly has the International Crisis Group, a non-governmental organisation issuing a report on armed drone attack in Pakistan, emphasised that “with or without Pakistani consent, both countries are subject to numerous obligations under national and international law. By allowing the U.S. to conduct drone operations in FATA, Pakistan is failing in its constitutional obligation to protect the lives of citizens and non-citizens on its territory” (International Crisis Group 2013, 6).

Because ‘targeted killing’ and similar counterterrorism practices are inherently directed at non-state actors in marginalized regions, discussions of their un/lawfulness which only take into account powerful state voices are problematic. Silence expresses the complicities between government agencies involved in the surveillance and targeting of non-state actors and raises awareness of the precarious position of non-state actors – who according to doctrinal rules of the language game of customary international law are not listened to: “Framing the death and destruction inflicted by drones in this [legal] manner can reinforce the invisibility of this violence in other ways too. In addition to circumscribing what kinds of questions can be asked, what kinds of

inquiries can be pursued and what kinds of arguments can be made, the reliance on international law helps to determine who can speak, who can be heard, and whose narratives will be allowed to puncture the public sphere” (T. Gregory 2015, 209)

Engaging with 'targeted killing' claims and practices as interwoven in a "global network of remote killing" (ECCHR 2017) maintained by transnationally operating secret services, executives and military elites (Zappala 2015, 255), then calls into question the idea of governments as the legitimate actors which are looked upon to clarify the legal framework for the targeting regime - and from whom speech is expected. This not only questions the communicative role of a particular state silence but contests one of the primary presumptions of the language game of customary international law: That it is sovereign states who should be listened to.

As discussed in Chapter III, Third World Approaches to International law have showed how the idea of the sovereign state as the law-creator in customary international law is historically situated in the turn towards positivism in the 19th century (Anghie 1999). Chimni thus critically engages with the silence created by current rules of customary international law formation, arguing that “it is therefore no accident that what has been common since the nineteenth century is that subaltern actors either do not speak or are not assigned adequate weight” (B. S. Chimni 2018, 19). He hence calls for a “postmodern doctrine of CIL” which would change the rules of law formation to “not simply [be] derived from the fact of coordination between states” but instead to “allow greater weight to the practice of non-state actors to determine the status of a norm as CIL” (B. S. Chimni 2018, 38).

Analysing customary international law as a language game, this dissertation argues that far from reflecting the interaction between states, dispersed discursive practices by non-state actors (scholars, journalists, NGOs, think tanks, corporations), which shape implicit assumptions and expectations of speech, have great weight in *how* the language game on the customary un/lawfulness of an issue is set up – for example in (re-)creating ‘targeted killing’ as a legal category or presupposing claims and practices as new. These discourses reflect, however, not a more open or democratic process, representing subaltern actors, but run the risk of mainly re-producing assumptions of Anglophone elites.

Theorising customary international law as a language game which can and has been played differently points, however, to an agency which does not depend on a new codification of customary international law. This agency is, rather, already present in lines of contestation regarding whether and how (based on which assumptions) issues are debated; contestations in which non-state actors play an important role. It also includes subversive shifts in who is listened to and whose speech or silence is understood to count. The language game of customary international law can thus be played by invoking a range of non-state voices, an approach adopted by some NGOs. Chris Cole from Drone Wars UK, for example, dedicates in a 2014 report on 'Drones and Targeted Killing' a whole section titled ‘Growing Condemnation’ to objections against armed drone attacks - by the EU Parliament, UN Special Rapporteur Emmerson, and opinion polls from over 40 countries (Cole 2014). The report ignores the basic rule that states are the most important voices and instead self-evidently brings non-state actors right into the language game of a developing customary

international law, demonstrating that "international opposition to US drone targeted killing grows" (Cole 2014).

5.4. Conclusion

In Chapter III and IV, I have argued that there is more *to* silence than most acquiescence debates would indicate – and problematized the assumptions which construe silence and enable it to work as potential acquiescence (i.e. the speech expectations regarding a prompt which is framed as legally relevant). This Chapter has demonstrated that there is more *than* silence understood as acquiescence already at work in the language game of customary international law. Focusing on the important role of the banal supposition of novelty, the Chapter thus investigated three different ways in which silence can and has functioned, each of which reveals a different modality of the language game of customary international law.

Building on the diachronic analysis of the previous Chapter, I first showed how the supposition of novelty leads to a discursive break which obscures historical struggles on similar claims and practices and presents a world in which existing legal frameworks are presumed to be inadequate. Through a high expectation of speech on practices which are presupposed as a new, legally relevant challenge to existing frameworks, silence can operate as acquiescence. The Chapter, second, examined how silence functions as confirmation of the status quo if this presupposition is *not* relied on. Some governments, for example, have rejected the notion that the new technology and deployment of armed

drones is legally relevant, framing their silence as confirmation that existing legal frameworks are adequate to address the practice.

Analysing the assumptions underneath different modalities of customary international law not only showed how silence can and has been at work in different ways (from tacitly consenting, to ignoring and disregarding) but also reveals contestations in ‘targeted killing’ debates regarding the very parameters through which the un/lawfulness of an issue is – or is not – invoked in the language game of customary international law. Investigating the underlying assumptions on which the role of silence depends, the Chapter thus further highlighted the importance of dispersed discursive practices in the (re-)production of assumptions – beyond state interactions or international institutions. I showed, for example, that the term ‘targeted killing’ itself has been widely used in Anglophone scholarship and media discourses, even though governments have systematically avoided the concept in the over 900 Security Council debates I investigated.

The Chapter, third, investigated how silence can function to open up or leave open the question of legality. If the expectation of speech is not fixed (i.e. to a new, legally relevant prompt) but lowered in adjustment to the particular discursive context, speech and silence are connected to questions of voice and the ability to speak. More traditionally, silence thus works to leave the question of un/lawfulness open by problematizing the legal deliberateness of state silences within a particular context, for example regarding the silence of governments to US practices at the Security Council. Expectation of speech is rather shifted to less central fora (for example the Human Rights Council) and more indirect forms of contestation, for example by discussing armed drone attacks through the framework of IHRL, rather than IHL.

Through the lens of silence, the Chapter has thus contributed a new perspective on current ‘targeted killing’ debates which reveals contestations regarding the very question of whether or how these claims should be debated.

The Chapter has also provided a different understanding of customary international law more generally. Rather than grasping it as a set of rules derived from the observation of state interaction, the Chapter has contributed to a more layered notion of customary international law as a language game which is played through diverging modalities in parallel. This not only reveals more fundamental and indirect contestations at work at the inter-state level, but analytically provides a framework for grasping the agency of other actors who are participating in the language game of customary international law (from scholars, to journalists, to NGOs) by delineating the assumptions through which the game is played. It also allows to trace how more fundamental rules of the language game of customary international law (i.e. that it is states which get to speak) can be questioned and subverted within the language game of customary international law.

Conclusion

Listening to Silence

In most approaches to customary international law, silence is understood as "first, a fact and a verbal omission" (Starski 2017, 22). It is already framed as potential acquiescence in relation to a particular practice. This conceptualisation of silence is based on an understanding of customary international law as a set of principles derived from observing state acts as if from the outside. Silence on 'targeted killing' practices and claims has thus been invoked as absence of protest, as evidence "that States accept or at least tolerate acts of self-defense against a non-State actor" (S. D. Murphy 2009, 126). In these invocations of silence as acquiescence, the discursive context is often ignored and silence appears in a common-sense way as evidence for tacit consent. The majority of all customary international laws are thus based on silence interpreted as acquiescence (Villiger 1985, 7:17; Byers 1999, 142; Mendelson 1996).

Unpacking the common-sense notion of silence as absence of protest, I examined the discursive context through which silence *gains* different functions. Building on sociolinguistic and discursive studies of silence,

I showed how the communicative function which silence assumes - and whether it assumes any communicative function at all - depends on the assumptions and expectations within the discursive context in which silence is used, invoked, construed, and interpreted. Far from only signifying tacit consent, silence can gain different communicative functions in inter-state relations. It can work as a neutral stance, a diplomatic move, to postpone a decision, to increase ambiguity about something, to resist a request, to ignore and disregard a claim – or it can be an outcome of silencing and exclusion from speaking.

The dissertation has used silence as an analytical lens in order to propose a new theorization of customary international law. Rather than approaching customary international law as a set of principles which is derived through observation of state acts as if from the outside, I theorised customary international law as a type of language game in which those who contribute to discussions on the un/lawfulness of an issue, directly participate. Building on Wittgenstein's philosophy of language and on discursive approaches to the international (see for example Doty 1993a; Pin-Fat 2000), I thus examined the different functions of silence in order to identify different modalities of the language game of customary international law – modalities which rest on fundamentally converse assumptions. It is at the level of these implicit assumptions that contestations take place regarding whether and how an issue should be approached within the language game of customary international law.

This is important because the self-evident assumptions are often linked to intricate power relations. Investigating silence operating as acquiescence in the particular case of 'targeted killing' debates has illustrated silencing dynamics, not just in inter-state relations but in legal

knowledge production more generally. I argued that in a technical understanding of the acquiescence doctrine, silence is taken as given - divorced from the discursive context from which it stems. This not only fails to take into account that some actors are not able to speak but also fails to reflect on the assumptions the interpreters themselves build on when invoking silence. The dissertation thus showed that not just the interpretation of silence but its very existence depends on the expectations of the listeners; both in the methodological exclusion of what is listened to, at what forum, in what time frame; and in how this listening takes place, how silence is linked to other discursive formations and made sense of in terms of, for example, a reaction to a pre-configured prompt (e.g. 'targeted killing'). The distance between the observer and the observed cannot escape the political nature of the act of interpretation and rather leads to an implicit confirmation of dominant assumptions.

Drawing on my empirical analysis of over 900 Security Council debates, Human Rights Council discussions of armed drone attacks and an investigation of the UN yearbook, the dissertation revealed problematic assumptions which further marginalize less powerful actors. In the case of 'targeted killing' claims and practices, silence can for example only be invoked as potential acquiescence by maintaining a high expectation of speech despite steep power asymmetries, such as the expectation of direct protest against US practices at the Security Council. Presuming silence as a deliberate, legal stance then not only exacerbates existing power asymmetries but leads to methodological forms of exclusion. Silence at the Security Council has thus been invoked by some interpreters, while ignoring protest at the Human Rights Council or objections by actors, such as the Non Aligned Movement. If we remain

solely at the level of applying objective criteria for acquiescence to a given silence, not only the “brutality of the passage of fact into law” (Stern 2000, 93) is masked but also the brutality of the passage of something (such as silence) into discursive fact.

Silence as an analytical lens hence not only allows to reveal power politics at the inter-state level, but power relations in a more decentralised understanding, as dispersed discursive practices which shape the creation of 'facts' which are to be turned into law. For silence to be communicative, for example, there already has to be the assumption of a legally relevant prompt which “calls for a response” (International Court of Justice 2008, 121). Investigating how the communicative function of silence links to other discursive representations thus shifts the focus from the meaning of concepts as fixed categories to their function. Thinking through the processes of meaning-making problematizes how 'targeted killing' can work as a prompt for non-reaction and how, for instance, the concept can lose its association with its more traditional terminological siblings - such as 'assassination' or 'police bombing' – which, I argued, describe similar practices and claims. The point of this problematization was not to say that 'targeted killing' is nothing new at all, but to show how the process of delineating acts such as armed drone attacks as a new, legally relevant prompt of 'targeted killing' is only one way of approaching practices, which directly impacts how the language game of customary international law is set up.

The creation of facts in customary international law is thus not a problem per se. What I tried to highlight in this dissertation is, rather, the implicitness of these assumptions, which often moves contested issues beyond dispute. By discussing, for example, whether a given

silence fulfils the requirements for acquiescence, not just the phenomenological existence of silence is construed, but the prompt is re-produced as legally relevant - by implication - and thus moved beyond political contestation. This shapes the way in which customary international law is set up on a particular issue and erases alternative modalities of engaging with practices, such as armed drone attacks.

Showing that the delineation of a new, legally relevant prompt is only one way of framing current practices and claims, opened space to investigate how alternative modalities are at work within the language game of customary international law in the case of 'targeted killing'. I thus showed that governments have engaged with 'targeted killing' practices through the modality of status quo when they emphasise that the new drone technology does not challenge existing legal frameworks and frame their silence as confirmation of the status quo, or when they avoid using the term 'targeted killing' altogether, instead relying on more traditional terms, such as 'assassination'. These lines of contestation are analytically erased if we remain within dominant, self-evident assumptions within which silence is already understood as a lack of objection to a preconceived prompt. Presenting alternative modalities of the language game of customary international law through which practices can gain meaning, I showed how the self-evident analytical gaze tends to favour powerful actors - in the case of 'targeted killing' for example, by moving towards a more expansive notion of the right to self-defence.

Conceptualising customary international law as a language game through the lens of silence thus contributes to discursive approaches to international law. Silence as an analytical lens not only shifts focus onto the question of who cannot speak and what is not heard, but also serves

as a lens in order to differentiate how customary international law is at work *differently*. Analysing the function of silence thus particularly reveals those expectations within the language game of customary international law which are not determined by legal principles or professionally shared assumptions but are embedded in more dispersed discursive practices, such as the novelty supposition in current 'targeted killing' debates. Investigating more 'banal' assumptions then opens space for agency within the language game of customary international law and aims to render the discourses on the un/lawfulness of 'targeted killing' "intelligible in ways that might make it seem amenable to political action" (Orford 2012, 622).

Empirically, the dissertation thus contributes to existing literature which is critical of 'targeted killing' claims in the context of a changing right to self-defence (see for example Krasmann 2012; Brooks 2014; O'Connell 2010; Grayson 2016). Analysing silence has not only challenged the acquiescence claim to 'targeted killing' because there has been protest – but has situated particular silences within a wider historical and political context. Demonstrating the importance of the act of interpretation for silence to operate as acquiescence, as well as for the very discursive existence of silence, the dissertation raises fundamental questions regarding the claim that "most other states seem to be willing to acquiesce in this reinterpretation of the customary law of self-defense" (Plaw and Reis 2016, 246)

The dissertation instead suggests a more embedded understanding of the processes through which concepts, such as 'targeted killing', are construed in the first place. Building on post-colonial approaches to similar practices and claims (see for example Neocleous 2013; Satia 2014; Allinson 2015; D. Gregory 2011a), I highlighted the colonial

legacy of justifications of small-scale military violence against non-state actors in marginalised regions, for example through 'police bombing' practices in former colonies and mandates. In the context of my dissertation, this colonial legacy is important because it highlights the discriminatory notion underlying some of the 'targeted killing' claims proposed in current debates and thus raises questions regarding the novelty presupposition through which such practices are often framed - a framing in which scholarship itself participates.

The dissertation consequently points to ways of engaging in the debate without re-producing the parameters which create 'targeted killing' as a legally relevant prompt. Independent of the perceived intentions of governments, the study on silence has underlined the importance of the act of interpretation and the possibility of engaging in the language game of customary international law along less dominant parameters. This has also showed counterintuitive dynamics, for example when the demand for governments "to oppose and ban the practice of extrajudicial targeted killings" and address the legal implications of the new technology of armed drones (European Parliament 2014, para 2; see also Joint Committee on Human Rights 2016b) might end up participating in the creation of 'targeted killing' as a new, legally relevant prompt which raises an expectation for speech.

Theorising customary international law as a language game in which different modalities are at work shows the processes through which concepts become part of the language game of customary international law. It also reveals the active role of those who are normally understood as outside observers of state acts. My research indicates, for example, that the term 'targeted killing' has been widely used in Anglophone scholarship and media discourses, while it has been systematically

avoided by state representatives over the more than 900 Security Council debates I analysed. Highlighting the importance of banal (and often implicit) assumptions underlying the modality through which acts are discussed and framed, the dissertation has traced space for agency and avenues of subverting, questioning and re-appropriating the language game of customary international law.

Theoretically, the dissertation highlights the necessity for a new theorisation of customary international law in order to re-think the meaning-making processes and the importance of implicit assumptions through which the debate on the un/lawfulness of issues is set up. Further research could build on this theorisation of customary international law as a language game and develop it, first, by expanding the empirical case studies. Investigating customary international law debates on a more diverse set of issues might reveal different dynamics than this dissertation demonstrates. In current 'targeted killing' debates, it has for example been the modality of evidence which has favoured dominant actors by working towards a more expansive right to self-defence in regions deemed 'unable or unwilling'. It would be important to investigate customary international law debates on issues which are more diametrically *opposed* to the practices and claims of powerful actors, for example debates on the restriction of military violence, such as the prohibition of torture, and to examine whether silence has also been mobilised as acquiescence in these cases.

Second, it would be important to analyse the sociopolitical context of actors within the language game of customary international law. This dissertation has argued that actors other than state representatives directly participate in the language game, but it was beyond the scope of this research project to analyse the particular field or sub-field of

these actors, their professional and educational background, or socioeconomic context. Further research could build on the different modalities of the language game of customary international law in relation to actors in a more sociological field analysis. In the case of 'targeted killing' debates, for example, it would be helpful to investigate which particular groups (e.g. international law experts socialised through particular institutions; or employees of some NGOs based in a particular socioeconomic context) have worked with the novelty supposition regarding 'targeted killing' and the right to self-defence. It could also be linked to the dynamics of a particular field or sub-field, for example by investigating whether the novelty supposition is an asset within the economy of academic scholarship.

Third, the present study could be expanded in order to investigate the historical trajectories of the language game of customary international law regarding the right to self-defence against non-state actors. This dissertation has pointed to some historical continuities in counterterrorism practices and claims over the previous decades. Attempts to broaden the right to self-defence against non-state actors have historically been particularly contentious before the context of decolonisation struggles and movements towards self-determination. It would be important to analyse whether the dominant modality regarding the approach to such claims has changed, for example within international law scholarship. Some scholars have recently argued that there has been a shift in legal scholarship and that "no international lawyer bats more than the proverbial eyelid nowadays at states intervening militarily in states which host non-state armed groups. Neither drone strikes nor what used to be called 'invasion' quicken the pulse of the *jus ad bellum* lawyer" (Kammerhofer 2016, 13; see for a

similar claim regarding a shift in the academic debate Henriksen 2014, 226; De Hoogh 2016, 20). This claim should be investigated, for example by analysing publications of a particular journal over various decades regarding the modality through which ‘assassination in self-defence’ claims and practices have been approached – and whether silence has been invoked as potential acquiescence. It could also be related to the modality which other actors (for example policy makers or journalists of a particular newspaper) have assumed regarding the right to self-defence against non-state actors over the last decades.

Fourth, this dissertation used the analytical lens of silence as a tool in order to examine the language game of customary international law. The analytical lens of silence could be used in other research areas, such as diplomacy studies, foreign policy analysis, feminist or post-colonial approaches to international relations and international law, in order to develop a better understanding of the various functions silence might assume. While there has been an increasing body of research regarding the role of speech acts and discourses in the international realm, it seems surprising that the communicative functions of silence in inter-state relations have received so little scholarly attention. The present study has provided a first step in highlighting the active functions silence might gain and in developing an analytical framework for tracing the line between communicative silence on the one hand, and different forms of silencing. This could be used in order to analyse the assumptions at play for silence to gain discursive functions in other language games.

Moving beyond a preconfigured boundary between the legal and the political field, silence offers a lens for scrutinising power relations. It draws attention to the listeners, to the assumptions and expectations

without which no communicative move would play its role. Silence might speak sometimes; yet, when someone says it speaks, when it is invoked as consent to a legal claim, for example, as disregard of a practice, as a forced silence stemming from actors biting their tongues - Is it silence which speaks or is it those who invoke it? Silence might speak sometimes, yet whether it speaks depends on what is listened to and how this listening takes place. Silence thus speaks not despite its political preconditions, but because of them – through them. This is how silence opens up space for reflecting on, resisting, and re-appropriating language games and draws attention to the thin line between communicative acts and the exclusion from speaking. And in the ambiguities and the questions it raises, silence can, perhaps, be used in order to reflect on our own listening skills, on the perceptions through which we already approach questions such as the un/lawfulness of something called ‘targeted killing’ [though sometimes not called that, sometimes not called at all] .

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